

PRESIDENTIAL CAMPAIGN ACTIVITIES OF 1972

SENATE RESOLUTION 60

APPENDIX TO THE HEARINGS OF THE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES OF THE UNITED STATES SENATE NINETY-THIRD CONGRESS FIRST AND SECOND SESSIONS

LEGAL DOCUMENTS RELATING TO THE SELECT COMMITTEE HEARINGS

WASHINGTON, D.C.

PART II



JUNE 28, 1974

**Printed for the use of the
Select Committee on Presidential Campaign Activities**

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SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

(Established by S. Res. 60, 93d Congress, 1st Session)



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*/ This litigation also related to the request for an immunity order for John W. Dean III. The papers that relate specifically to Mr. Dean are omitted to avoid duplication.

**/ This litigation also related to the request for an immunity order for Gordon Strachan. The papers that relate specifically to Mr. Strachan are omitted to avoid duplication.

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THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its
own name and in the name of the
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. GURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities

RECEIVED

FEB 21 1974

CLERK OF THE UNITED
STATES COURT OF APPEALS

No. 74-1258

Appellants

v.

RICHARD M. NIXON, individually and as
President of the United States

Appellee

MOTION TO SET EXPEDITED BRIEFING AND ARGUMENT SCHEDULE
AND SUGGESTION THAT HEARING BE EN BANC

Appellants hereby move this Court to set the following
expedited briefing and argument schedule for this case:

1. Appellants shall file their brief by February 25,
1974.
2. Appellee President shall file his brief by March 11,
1974.
3. Argument shall be had on this case on March 19, 1974.

If appellants desire to file a reply brief they shall
do so by March 18, 1974.

-2-

Appellants also suggest to the Court that hearing in this matter be en banc.

Appellants are again before this Court asking for expedition, as they have done at virtually every stage of this litigation. */

The current date on which the Committee must file its final report is now May 28, 1974, the time having been recently extended from February 28 by the full Senate. Even with the extension, the time in which the Committee must complete its work is all too brief. The tape recordings sought by this lawsuit are vital to the Committee's lawmaking and informing functions and are needed for the preparation of its final report. Thus the Committee has urgent need for the prompt resolution of the present controversy.

Moreover, this case concerns more than the Committee's attempt to achieve vital evidence. It now involves the serious constitutional question whether a District Judge, in ruling on the validity and enforceability of a Congressional subpoena, has the power to subordinate a demonstrable legislative need to the Court's view of the requirements of judicial administration. This is an important constitutional issue that should be promptly resolved.

We perceive no great hardship on appellee, considering the resources at his command and the fact that many potential issues

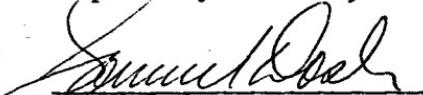
*/ The Select Committee met last Tuesday at the first opportunity after the Congressional recess and voted unanimously to prosecute this appeal.

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are already briefed, if he is required to respond to our brief on appeal within fourteen days. Appellee's counsel, at an earlier stage of this case, agreed that an expedited briefing and argument schedule before this Court was appropriate. Appellee's counsel were also able to meet the accelerated schedule established in the Special Prosecutor's case.

The appellants also suggest, as they have done before, that the important issues in this lawsuit be heard and decided by the full bench. Appellee's counsel has informed counsel for appellants that appellee is amenable to an en banc hearing.

Respectfully submitted,



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RECEIVED THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEB 25 1974

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 CAMPAIGN ACTIVITIES, suing in its
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and

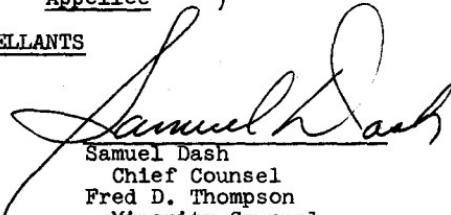
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 and LOWELL P. WEICKER, JR., as United
 States Senators who are members of the
 Senate Select Committee on Presidential
 Campaign Activities

No. 74-1258

Appellants

v.

RICHARD M. NIXON, Individually and as
 President of the United States

AppelleeBRIEF OF APPELLANTS


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February 25, 1974

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUITSENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its
own name and in the name of the
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. BURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities

No. 74-1258

Appellants

v.

RICHARD M. NIXON, individually and as
President of the United StatesAppelleeBRIEF OF APPELLANTSIssues Presented For Review

1. Whether the District Court, in determining the legal validity of a Congressional subpoena for evidence, may substitute its judgment for the wisdom of the legislature and overrule a legislative determination of need because of the Court's own view of the possible prejudicial effect on potential criminal trials of releasing the tape recordings at issue.
2. If the District Court was correct in concluding that it could overrule a legislative determination of need in certain situations, whether that Court erred in doing so in the present circumstances where there is a demonstrable, pressing legislative need for the evidence subpoenaed and the danger to fair trials

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if this material is released appears minimal.

3. Whether this Court, to avoid needless friction with the Congress, should, at the least, order release of the vital evidence sought to the Committee under a stringent protective order -- to which the Committee would agree -- that would allow the Committee to perform its legislative functions but prevent publication of the contents of the tape recordings at this time.

This case was previously before this Court in No. 73-2086 under the same caption as above. The Court's en banc order remanding that matter to the District Court is found at JA 138. */

References to Parties and Rulings

The parties to this case are listed in the caption. This appeal seeks review of the opinion and order of the Honorable Gerhard A. Gesell of the United States District Court for the District of Columbia that was entered on February 8, 1974, in C.A. No. 1593-73, and dismissed this action without prejudice. JA 164.

Statement of the Case **/

The Senate Select Committee on Presidential Campaign Activities was created on February 7, 1973, by the unanimous

*/ JA refers to the "Joint Appendix."

**/ The basic facts relevant to this case are set out in Plaintiffs Statement of Material Facts As To Which There Is No Genuine Issue (hereinafter referred to as "Statement") found at JA 110, and in the undisputed portions of the Complaint and Amended Complaint. Appellee does not challenge the facts set forth in this Statement and they are thus established for purposes of this litigation.

passage of Senate Resolution 60, 93d Congress, 1st Session.

JA 11. Pursuant to this Resolution (Sec. 1 (a)) the Committee is empowered to investigate "illegal, improper or unethical activities" occurring in connection with the presidential campaign and election of 1972, and "to determine. . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." Section 3 (a) (5) of S. Res. 60 empowers the Committee

". . . to require by subpoena . . . any department, agency, officer, or employee of the executive branch of the United States Government. . . to produce for its consideration or for use as evidence in its investigation and study any. . . tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control. . . ."

On July 16, 1973, Alexander P. Butterfield, former Deputy Assistant to President Richard M. Nixon, testified before the Committee that certain Presidential conversations had been recorded by electronic means and were preserved on tapes. After informal attempts by the Committee to obtain from the President certain tapes and other materials relating to the 1972 presidential campaign and election had failed, the Committee, on July 23, 1973, issued two subpoenas duces tecum to the President that were returnable on July 26, 1973.

The subpoena that is the subject of this appeal directed the President to make available to the Committee certain tapes that recorded five face-to-face conversations "between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972."

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The five conversations occurred on September 15, 1972, February 28, 1973, March 13, 1973, and March 21, 1973, there being two conversations on the last mentioned date.

The President, in a July 25, 1973, letter to Sam J. Ervin, Jr., Chairman of the Select Committee, informed the Committee that he would not comply with the subpoenas directed to him. JA 34. See also JA 36,⁴⁰. It subsequently appeared that the basic ground for this refusal was the doctrine of executive privilege, which was allegedly asserted to protect the confidentiality of presidential communications. However, the supposed confidentiality protected by this claim of executive privilege has been repeatedly breached. The President has himself revealed -- and has authorized his aides, both past and present, to reveal -- the contents of the taped conversations sought by this appeal. Statement, paras. 11-16, 19-24. JA 11⁴-25. The Statement (paras. 11-16) sets forth various public accounts of the contents of these five conversations provided by the President, John Dean, H.R. Haldeman, and others. This Court, in Nixon v. Sirica, ____ U.S. App. D.C. ____, 487 F. 2d 700, 717-18 (1973), has taken notice of the President's authorization for public testimony by his aides relating to the Watergate affair and the voluminous public testimony resulting from this presidential decision. The five tapes at issue have now been released to the Special Prosecutor and four of them (excluding the February 28 tape) have been played to the grand jury. JA 159 & n. 5, 160, 161.

On August 9, 1973, plaintiffs brought the present action seeking enforcement of the subpoenas. The complaint is found at JA 1. On August 29 (the earliest date allowable) plaintiffs

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filed a motion for summary judgment seeking a declaratory judgment that the subpoenas were lawful and must therefore be complied with, and that the President's refusal to obey them was illegal and could not be justified by resort to any asserted presidential power, prerogative, or privilege. The motion did not ask the Court to issue an injunction against the President requiring compliance with the subpoenas. JA 108.

On October 17, the District Court (Sirica J.) denied the Committee's motion and dismissed this action for want of jurisdiction. Appellants, on October 19, noted their appeal, but subsequently asked this Court to hold the case in abeyance pending action on a bill then before Congress to give the District Court jurisdiction over this suit. On December 19, a new jurisdictional statute, Public Law 93-190, which the President failed to veto, took effect. JA 137. Meanwhile, the Senate had unanimously enacted Senate Resolution 194, 93d Cong., 1st Sess. (Nov. 2, 1973), which establishes that the Committee was and is authorized by the Senate to subpoena and sue the President and which affirms that the Committee, in subpoenaing and suing the President, was and is acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions. JA 13⁴. That the Committee does have a pressing need to obtain the evidence in question in order to fulfill its law-making responsibilities and its informing function is demonstrated in Section II below.

This Court, on December 28, 1973, remanded this case to the lower Court "for further proceedings in light of Pub. L.

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No. 93-190." JA 138. The matter was subsequently reassigned to Judge Gesell who, on January 25, 1974, issued three orders:

(1) He denied the Committee prayer for enforcement of the second subpoena involved in this lawsuit. JA 148. No appeal is taken from this order. */

(2) He requested the Special Prosecutor to submit a "statement concerning the effect, if any, that compliance with the subpoena at issue would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision." JA 144. The Special Prosecutor's response, dated February 6, 1974, is found at JA 154. Because of his conviction that, with a careful voir dire, "all defendants will receive a fair and prompt trial," the Special Prosecution took "no position on whether the Court . . . should consider the danger of prejudicial pretrial publicity a decisive factor" in its decision whether to release the tapes to the Committee. JA 159.

(3) Finding that the President's claim of executive privilege was "too general and not sufficiently contemporaneous to enable the Court to determine the effect of that claim under the doctrine of Nixon v. Sirica", the Court requested the President to submit "a particularized statement addressed to specific portions of the subpoenaed tape recording indicating whether he still wishes to invoke executive privilege as to

*/ We do note, however, that the Court's "quashing" of this subpoena appears improper under comity and speech and debate clause principles, particularly since the defendant did not move that the subpoena be "quashed." See, e.g., Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F. 2d 894 (1972); Ansara v. Eastland, 143 U.S. App. D.C. 29, 442 F. 2d 751 (1971); Gravel v. United States, 408 U.S. 606, 619-20 (1972).

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these tapes and, with regard to those portions as to which the privilege is still asserted, if any, the factual ground or grounds for his determination that disclosure to the Select Committee would not be in the public interest". JA 139. The President's response, also dated February 6, 1974, is found at JA 162. It contains no particularized claim of privilege.

On February 8, Judge Gesell issued a "Memorandum and Order" which dismissed the complaint herein "without prejudice" because of his fear that pretrial publicity generated by release of the tapes would pose the risk of bolstering future contentions that judicial administration of the Watergate trials was impeded. JA 164. It is this order from which plaintiffs appeal.

Argument

The basics of appellants' presentation can be briefly stated. The District Court has ruled for appellants on the issues of executive privilege, justiciability, and jurisdiction, among others. It ruled that the material sought is relevant to the Committee's functions. It did not dispute the Committee's power to issue the subpoena in question. The Court, however, has declined to enforce the Committee's subpoena, basing its ruling on an apparently new rule of law that a legislative need for relevant evidence may be subjugated to the Court's view of the need to prevent an asserted prejudicial effect on potential trials. This rule finds no support in decisional law and, in fact, is contrary to well-established principles that prohibit a Court from refusing to issue a declaratory judgment supporting a Congressional action simply because it disagrees with the legislative wisdom or policy behind that measure. Moreover, even if an asserted judicial need can be properly weighed against

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legislative need in determining whether a Congressional subpoena should be enforced, the balance should be struck for Congress in this case where there is a demonstrable, pressing legislative need for the material subpoenaed and the danger to fair trials from release of the tapes to the Committee appears minimal.

Finally, this Court, at the least, should decree release of the tapes to the Committee under a protective order, to which the Committee will agree, which will enable it to fulfill its legislative functions, but also prevent public playing of these tapes at an inopportune time.

Before turning to our arguments in detail, several initial comments concerning the lower Court's opinion are in order. The District Court suggests that plaintiffs, in their motion for summary judgment, sought an "affirmative injunction" directing compliance with the subpoena, and it ruled that the Committee is not "entitled at this particular time to an injunction." JA 164, 169-70. Actually, the Committee's motion (as opposed to its complaint) did not seek an injunction, but only requested declaratory judgment in its favor. Thus, this Court, on review, should decide whether a declaratory judgment -- not an injunction -- is appropriate.*/ If this Court decides that the lower Court's order should be taken as a refusal of declaratory relief, it may, "in reviewing the trial court's exercise of discretion to . . . refuse declaratory relief, . . . substitute its own judgment for that of the lower court" and reverse

*/Relevant in this regard is the principle that a Court will enter a declaratory judgment in circumstances where it would initially decline to issue an injunction out of respect for the person sued or to avoid a clash between coordinate branches of government. E.g., Powell v. McCormack, 395 U.S. 486, 499 (1969); National Treasury Employees Union v. Nixon (D.C. Cir. No. 72-1929, Jan. 25, 1974) (Slip opn. at 55-6.)

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if it finds "the determination of the trial court . . . erroneous," even if it deems that determination "not arbitrary or capricious." Broadview Chemical Corp. v. Loctite Corp., 417 F. 2d 998, 1000 (2d Cir. 1969) cert. denied, 397 U.S. 1064 (1970). In any event, this Court should reverse because the lower Court has applied an erroneous rule of law, because its conclusion (JA 169-70) that the Committee "has not established by a preponderance of the evidence" that its subpoenas should be enforced is without "substantial evidentiary support" and must leave this Court "with the definite and firm conviction that a mistake has been committed, and because its refusal to grant relief to plaintiffs on the undisputed facts at hand constitutes a clear abuse of discretion. See Case v. Morrisette, U.S. App. D.C. [redacted], 475 F. 2d 1300, 1306-08 (1973).

I. The District Court Had No Authority To Overrule A Legislative Determination Of Need Because Of Its Own View Of The Possible Impact On Future Trials

A. The District Court Has Established A New Rule Of Law That Congress' Legislative Need May Be Subjugated To The Court's Own View Of The Need To Prevent An Asserted Prejudicial Effect On Potential Criminal Trials

Although the District Court ruled that the "tapes are relevant to the Committee's functions," (JA 164), it declined to enter an order declaring that compliance with the Committee's subpoena is required. It is plain from the Court's opinion, however, that its refusal to support the Committee's subpoena was not based on the doctrine of executive privilege:

" . . . [T]he Court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications, see Nixon v. Sirica, supra, at 719-20, and the President's unwillingness to submit the tapes for the Court's in camera ex parte inspection or in any other fashion to particularize his claim of

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executive privilege precludes recognition of that privilege on confidentiality grounds. Cf. United States v. Burr, 25 Fed. Cas. 187, 192 (Case No. 14,594) (1807).^{*} JA 166. ^{*/}

But, the Court indicated, this is not the end of the matter. Rather, "the Court is compelled to weigh the effect that disclosure of the subpoenaed portions of these tapes might have upon criminal trials scheduled or soon to be scheduled on the calendar of this Court." JA 167.

The result of this balancing process, the Court stated, favors the judicial process:

"No one can doubt that, should the President be forced to comply with the subpoena, public disclosure of these tapes would immediately generate considerable publicity. While it is impossible, as the Special Prosecutor points out, to assess the precise impact of such publicity on the forthcoming judicial proceedings, the risk exists that it would bolster contentions that unbiased juries cannot be impaneled for trial.

" . . . The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration.

* * *

"The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for

^{*/} The Court also held this case justiciable, rejecting the President's claim that it involves a "political question," and recognized that it had jurisdiction over this matter by virtue of Public Law 93-190. JA 165. These matters were thoroughly briefed by the parties below.

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ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected." JA 167-69.

Thus the basis for the Court's decision is plainly stated. While finding the tapes "relevant to the Committee's functions," the Court has substituted its judgment for the legislature's as to the public need for production of these tapes and ruled that, in this instance, the legislative need is subsidiary to that of judicial administration. It has done so in a situation where no potential Watergate defendant has entered an appearance in this case to complain that release of the tapes may work him harm, where the Special Prosecutor took no position on what action the Court should take, and where the President has allowed many of his aides to testify fully as to the contents of the tapes, an action obviously inconsistent with the claim of prejudicial pretrial publicity he now raises. */ Moreover, the

*/ The Court has stated that the Executive has the right to assert a pretrial publicity claim because of his duty to see that the laws are faithfully executed. JA 167. However, the President's expressed concern for pretrial publicity was belated and was not stated to the Court with any force until the Court solicited the opinion of the Special Prosecutor. Significantly, the President did not raise this issue before the Committee in his refusal to comply with the subpoena. JA 34-41. Thus, under traditional principles, he should be held to have waived any defense based on this ground.

"To hold otherwise would enable one subpoenaed to toy with a congressional committee in a manner obnoxious to the rule that such committees are entitled to be clearly apprised of the grounds on which he asserts a right of refusal to answer". Hucheson v. United States, 369 U.S. 599, 611 (1962).

See also, McPhaul v. United States, 364 U.S. 372, 379 (1960); United States v. Bryan, 339 U.S. 323, 333 (1950); Shelton v. United States, 131 U.S. App. D.C. 315, 322, 404 F2d 1292, 1299 (1968), cert. denied, 393 U.S. 1024 (1969).

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Court appears to say that the executive -- or one who might be injured by disclosure -- has a "privilege" to refuse to produce evidence that might provoke adverse pretrial publicity respecting possible criminal trials. The Court, however, cites no case for the rule of law that it expounds or the apparent "privilege" it creates. Nixon v. Sirica is not precedent for this ruling because that case only held that, in the executive privilege determination, the public interest protected by that privilege -- the need for confidentiality to preserve "the effectiveness of the executive decision-making powers" -- must be weighed against the public interest in disclosure, whatever it may be. See 487 F. 2d at 716-17. That case does not allow the Court to create another balancing test and weigh an asserted judicial need against legislative requirements in determining whether a Congressional subpoena should be enforced.

We submit that the proposition that a Court can refuse to support a legislative subpoena because of the Court's view that the requirements of judicial administration outweigh a legislative need to obtain evidence that Congress determines is vital to its functions not only finds no support in established law but is contrary to fundamental notions of our jurisprudence. Our position in this regard is now elaborated.

B. The Purported Rule Of Law Asserted By The District Court Cannot Be Sustained; A Court Cannot Refuse To Declare A Legislative Action Valid Because It Differs With The Policy Reasons Behind That Action.

It is useful to initiate this discussion by recounting certain fundamental principles respecting legislative investigations,

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beginning with the observation in Watkins v. United States,
354 U.S. 178, 187 (1957), that:

" . . . The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste . . . "

See also Barenblatt v. United States, 360 U.S. 109, 111 (1959); Shelton v. United States, 131 U.S. App. D.C. 315, 319-20, 404 F. 2d 1292, 1296-97 (1968); Townsend v. United States, 68 U.S. App. D.C. 223, 232, 95 F. 2d 352, 361 (1938) cert. denied, 303 U.S. 664 (1938).

The Supreme Court, in numerous cases, has affirmed the right of Congress to issue subpoenas in aid of its investigatory processes. For example, in McGrain v. Daugherty, 273 U.S. 135, 174 (1927), that Court said:

"We are of opinion that the power of inquiry --- with process to enforce it --- is an essential and appropriate auxiliary to the legislative function." (emphasis added)*/

See also Shelton v. United States, supra, 131 U.S. App. D.C. at 319.

The Supreme Court has also emphasized the duty of all citizens to respond to Congressional subpoenas:

*/ In McGrain, the Court (p. 158) also said:
" . . . The Committee was acting for the Senate and under its authorization; and therefore the subpoenas which the Committee issued and the witness refused to obey are to be treated as if issued by the Senate."
See also, in the same vein, Watkins v. United States, supra, at 200-01.

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"It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of Congress and its committees and to testify fully with respect to matters within the province of proper investigation." Watkins v. United States, supra at 187-88.

This duty exists in part because the "fundamental maxim that the public... has a right to every man's evidence" is just as applicable to legislative as to judicial subpoenas. United States v. Bryan, 339 U.S. 323, 331 (1950). ^{*/} As Judge MacKinnon, concurring in part and dissenting in part in Nixon v. Sirica, aptly stated:

"A congressional subpoena issued for the purpose of obtaining facts upon which to legislate carries at least as much weight as a judicial subpoena issued for the purpose of obtaining evidence of criminal offenses. The only differences between these two types of subpoenas occur in the subject matter to which the subpoena power may be directed. Congressional subpoenas seek information in aid of the power to legislate for the entire nation while judicial subpoenas seek information in aid of the power to adjudicate controversies between individual litigants in a single civil or criminal case. A grand jury subpoena seeks facts to determine whether there is probable cause that a criminal law has been violated by a few people in a particular instance. A congressional subpoena seeks facts which become the basis for legislation that directly affects over 200 million people. Thus, both congressional and judicial subpoenas serve vital interests, and one interest is no more vital than the other." 487 F.2d at 737. (emphasis added)

*/ The Byran Court continued (p.331)

"...When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."

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The role of the Courts in reviewing Congressional subpoenas
is limited.

"' It must be remembered that legislatures are ultimate
guardians of the liberties and welfare of the people
in quite as great a degree as the Courts'. The courts
have no authority to speak or act upon the conduct by
the legislative branch of its own business, so long
as the bounds of power and pertineney are not exceeded,
and the mere possibility that the power of inquiry may
be abused 'affords no ground for denying the power'"...
Barsky v. United States 83 U.S. App. D.C. 127, 136,
167 F. 2d 241, 250 (1947), cert. denied, 334 U.S. 843 (1948).

"...It is neither the business or the prerogative
of this Court or any other Court to pass upon either the
wisdom of Congress in setting up the Committee, the
private or public character of Members of the Committee
or the propriety of the procedure of the Committee
unless it transgresses the authority committed to it by
the Congress under the Constitution" Dennis v. United
States, 84 U.S. App. D.C. 31, 33, 171 F.2d 986,
988 (1948) (emphasis added)

See also In Re Motion To Quash Subpoenas And Vacate Service,
146 F. Supp. 792, 794-5 (W. D. Pa. 1956). */

Once a Court has determined that a Congressional committee
acts within its power and seeks information pertinent to its
functions, its responsibility is "not to pass judgment upon the
general wisdom or efficacy of the activities of a committee
in a vexing and complicated field." Barenblatt v. United States,

*/Cf. Railway Employees' Department, American Federation of
Labor, International Association of Machinists v. Hanson, et al.,
351 U.S. 225, 234, (1956); General Telephone Company of the
Southwest v. United States, 449 F. 2d 846, 859, (5th Cir. 1971)
and cases cited. In the latter case the Court said:

"It is, of course, clear that the courts are without
power to substitute their judgment for that of the leg-
islative body whose responsibility it is, in the first
instance, to decide policy questions."

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supra at 125. ". . . It does not lie with this Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes."

Hutcheson v. United States, 369 U.S. 599, 618, 619 (1962).

It goes without saying that a Court, in deciding whether to render or, refuse a declaratory judgment, must be governed by "fixed legal principles." E.g. Hardware Mut. Casualty Co. v. Schantz, 178 F.2d 779, 780 (5th Cir. 1949); Franklin Life Insurance Company v. Johnson, 157 F.2d 653, 656 (10th Cir. 1946); Crosley Corp. v. Westinghouse Electric and Manufacturing Co., 130 F.2d 474, 475 (3d Cir. 1942); Moore's Federal Practice, para. 57.08 [2], p. 57-38. Therefore, a Court in deciding whether a Congressional subpoena must be complied with in the declaratory judgment context, must be controlled by the above "fixed legal principles" respecting the relations of Courts and Congress and has no discretion to stray from their dictates. A Court simply cannot refuse to give force to a legislative measure because it disagrees with the policy considerations that underlie that action.

The application of the above principles to the present case is apparent. Most importantly for our purposes, it is evident that the District Court has gone beyond the limits placed on it by the principles enunciated in Barsky, Barenblatt, Hutcheson and other decisions of that nature. The District Court did not find that the Committee lacked the "power" to subpoena the evidence in question. Moreover, it expressly ruled that the tapes subpoenaed are "pertinent," stating that "these tapes are relevant to the Committee's function." JA 164. It did not find that any privilege prohibited release of the tapes to

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appellants. But the Court has substituted its judgment for the Committee's as to the "wisdom and efficacy of the activities" of the Committee in seeking the tapes in question, stating that, in the Court's judgment, the requirements of judicial administration outweigh the legislative need for production of this evidence. The Court, in asserting that the Committee has no "pressing need" for the evidence subpoenaed, has taken it upon itself to say that the Committee has "acquired sufficient information for its legislative purposes." The Court's ruling thus constitutes an improper assumption of legislative functions. The Congress, of course, must base its judgments as to how to use evidence it obtains on an estimate of the rights of the parties involved. "When a congressional inquiry and a criminal prosecution cross paths, Congress must accommodate the public interest in legitimate legislative inquiry with the public interest in securing the witness a fair trial" Hutcheson v. United States, supra at 624 (Brennan, J., concurring)(emphasis added). */

*/ Other Courts have made similar observations. "'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts.'" Barsky v. United States, supra, 83 U.S. App. D.C. at 136. "We may rightly assume that the legislators are sensitive to, and will endeavor to act conformably to, the principle that the Bill of Rights applies to the legislature's investigations as well as to its enactments." Ansara v. Eastland, 143 U.S. App. D.C. 29, 32, 442 F. 2d 751, 754 (1971). "For us to presume that the House of Representatives, the body most susceptible to the will of the people, will be less sensitive to the Constitutional rights of the citizen than will be this Court would authorize a presumption I am not prepared to accept." In Re Motion To Quash Subpenas And Vacate Service, supra, 146 F. Supp. at 795. And see the lower Court's opinion at JA 166, 169. As discussed in more detail in sections II and III of this brief, the Committee has taken the rights of potential defendants into consideration in charting its legislative actions -- including the decision to pursue enforcement of its subpoenas through litigation -- and it will continue to do so in the future.

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But we need not base our conclusion that the Court has exceeded its proper role solely on the application of well-established general principles, for the lower Court's opinion is contrary to the two leading cases dealing with pretrial publicity engendered by a legislative hearing -- Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952) and Hutcheson v. United States, 369 U.S. 599 (1962). Moreover, it also appears at odds with Judge Sirica's learned opinion in Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D. C. 1973).

Delaney involved an appeal from convictions stemming from Delaney's improper conduct while Collector of Internal Revenue for the District of Massachusetts. Delaney had unsuccessfully sought a continuance of his trial that began on January 3, 1952, and resulted in judgments of conviction on January 29, 1952. The basis of the continuance motion was the massive adverse publicity against him resulting from the public hearings of the House Subcommittee on Administration of the Internal Revenue Laws (the King Committee), which was investigating criminal conduct into Delaney's office. The hearings had commenced on October 16, 1951, and continued through October 22. Both Delaney and the Department of Justice had attempted -- to no avail -- to persuade the King Committee to refrain from holding public hearings, at least until conclusion of trial. The appellate Court reversed on the grounds that the District Court erred in not granting the requested continuance, but plainly stated that the King Committee, in pursuing its hearings, had acted in lawful fashion.

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"...We mean to imply no criticism of the action of the King Committee. We have no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it. It was for the committee to decide whether considerations of public interest demanded at that time a full-dress public investigation of the affairs of the Internal Revenue Bureau, including particularly the conduct of Delaney's office in Boston."

* * *

"...If... the legislative committee deemed that an open hearing at that time was required by over-riding considerations of public interest, then the committee was of course free to go ahead with its hearing ..." 199 F. 2d at 114-15.

The Hutcheson case is even more significant for present purposes. This was a contempt of Congress case where the defendant had failed to answer questions put to him by the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee). Hutcheson, at the time the questions were propounded, was under indictment in an Indiana state court, and he contended that requiring him to answer the Committee's questions violated his due process of law in that the Committee's proceedings constituted a "pre-trial" of the state charges against him. */ The two dissenters (Warren and Douglas, J.J.**) argued, in language reminiscent of the lower Court's opinion, ***/ that Congress,

*/ Hutcheson did not, however, invoke his privilege against self-incrimination.

**/ The Court sustained Hutcheson's conviction by a 4-2 vote. Justice Harlan wrote an opinion in which Justices Clark and Stewart joined. Justice Brennan concurred in the result with a separate opinion. Justice Harlan's opinion has previously been cited by this Court with approval. E.g., Sanders v. McClellan, supra.

***/ See JA 169 where the Court declares that it will not lend its jurisdiction "to enforce a subpoena which would exacerbate . . . pretrial publicity."

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in such circumstances should not be allowed "to enlist the aid of the federal courts" to convict Hutcheson for contempt. 369 U.S. at 160, 161. See also 369 U.S. at 165. The majority, however, took a different view and upheld the conviction. Justice Harlan's opinion is worthy of quotation at length:

"Nor can it be argued that the mere pendency of the state indictment ipso facto closed this avenue of interrogation to the Committee.

"The suggestion made in dissent that the questions which petitioner refused to answer were "outside the power of a committee to ask"... under the Due Process Clause because they touched on matters then pending in judicial proceedings cannot be accepted for several reasons ... The reasoning underlying this proposition is that these inquiries constituted a legislative encroachment on the judicial function. But such reasoning can hardly be limited to inquiries that may be germane to existing judicial proceedings; it would surely apply as well to inquiries calling for answers that might be used to the prejudice of the witness in any future judicial proceeding. If such were the reach of 'due process' it would turn a witness' privilege against self-incrimination into a self-operating restraint on congressional inquiry, see 8 Wigmore, Evidence (3d ed.), § 2268; p. 20.infra, and would in effect pro tanto obliterate the need for that constitutional protection.

* * *

"Surely a congressional committee which is engaged in legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding ... or when crime or wrongdoing is disclosed."

* * *

"Surely a congressional committee which is engaged in legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding ... or when crime or wrongdoing is disclosed.

* * *

"In conclusion, it is appropriate to observe that ... the Constitution ... imposes on the Judiciary the ... duty of not lightly interfering with Congress' exercise of its legitimate functions. 369 U.S. at 613, 614, 618, 619, 622. (emphasis added)

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Hutcheson, of course, presented a stronger case for judicial protection than the present one because, in that case, an individual had been convicted for refusing to testify and thus his liberty was at stake. Here, as demonstrated below, the harm to potential defendants the lower Court seeks to prevent is quite speculative.

Judge Sirica's opinion in Application of United States Senate Select Committee On Presidential Campaign Activities is also instructive. In this opinion, Judge Sirica refused to condition an order conferring use immunity of John Dean and Jeb Magruder respecting their testimony before the Select Committee on restrictions that would limit the publication of that testimony. The initial ground for the Court's ruling was that the immunity statute, 18 U.S.C. § 6005, gave it no discretion to impose conditions on the Committee. But the Court was also asked "to exercise inherent powers / to condition the grant of immunity / in the interest of preserving the rights of potential defendants." 361 F. Supp. at 1280. The Court, however, declined to utilize its discretionary powers in this fashion, even though the Committee had invoked its jurisdiction and enlisted its aid in the immunity proceeding:

" ... It is clear that the Court could not go beyond administering its own affairs and attempt to regulate proceedings before a coordinate branch of government... On the contrary, decisional law mandates a 'hands-off' policy on the Court's part." 361 F. Supp. at 1280.

The Court cited Delaney and Hutcheson, among other decisions, for this proposition. The Court's ruling in this regard appears

not to be based on an application of the immunity statute but on the Court's view of its proper role when called upon to assist the legislative process. */

As already observed, the District Court cites no cases that would sustain the rule of law it has propounded or counteract the authority we have marshalled. The President's letter

*/ Judge Sirica also entered writs of habeas corpus ad testificandum that allowed Watergate figures E. Howard Hunt and Bernard Barker to testify publicly before the Committee. And he has issued an order in the Special Prosecutor's case against the President that would allow the President to release the tapes to the Committee or the public at large. See *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, Misc. No. 47-73 (D.D.C. November 14, 1973). See P. 35 *supra*.

There are yet other cases that suggest that the lower Court's opinion is in error. *United States v. Orman*, 207 F. 2d 148 (3d Cir. 1953) and *United States v. Hintz*, 193 F. Supp. 325 (N.D. Ill. 1961) were both contempt cases where a defendant unsuccessfully claimed that compelling him to testify before a Congressional committee investigating criminal activities would violate his rights in the absence of measures by the committee to prevent the publicizing of his testimony. And note 2 U.S. C. § 193 which states:

"No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

Also relevant are cases such as *Sanders v. McClellan*, *supra* and *Ansara v. Eastland*, *supra* where this Court refused to restrain Senate committees in the exercise of their legislative functions. In *Sanders*, this Court, quoting *Hutcheson*, observed that "the judiciary has the duty of not lightly interfering with Congress' exercise of its legitimate powers." Cf. *In The Matter Of Hearings Before The Committee On Banking And Currency Of The United States Senate*, 19 F.R.D. 410 (N.D. Ill. 1956) where the Court allowed a Senate Committee, upon motion, to examine material that had been submitted to a grand jury in the face of a claim that disclosure would violate the secrecy of that body as protected by Rule 6 (e) F.R. Crim. P. See also, in this vein, *United States v. Interstate Dress Carrier, Inc.*, 280 F. 2d 52 (2d Cir. 1960).

of February 6, 1974, contains no reference to such case law and we know of none. Moreover, strong policy reasons militate against appellate approbation of this rule. If approved, this rule apparently would not only give the executive or an individual under criminal suspicion a novel defense or privilege in an action to enforce a Congressional subpoena, but would also provide a new and unique defense to a defendant indicted for contempt of Congress. Such a defense would seriously debilitate the effectiveness of a Congressional committee -- like the Select Committee -- which investigates areas of criminal conduct and which interrogates or seeks information from persons in the executive branch or from actual or potential defendants in criminal trials. We submit to the Court that the carefully guarded protection against self-incrimination and the other legitimate privileges now recognized by our law are sufficient shields for persons who find themselves in such circumstances. See Hutcheson v. United States, supra at 614, n. 16. Furthermore, as the Supreme Court noted in Watkins v. United States, supra, 354 U.S. at 200, n. 33, the investigatory powers of Congress have their greatest utility when trained on corruption in the executive branch. It would be unfortunate if the executive in the future could emasculate legislative investigations of its conduct simply by instituting a grand jury investigation into the same circumstances the Congress is examining.

II. Were It Proper To Weigh Judicial Need Against Legislative Need In An Action To Enforce A Congressional Subpena, The Balance Must In This Case Be Struck In Congress' Favor

Assuming arguendo that the law allows a Court, in enforcing a Congressional subpoena, to weigh the requirements of judicial administration against the legislative need for the materials in question, we submit -- with due respect to the District Court -- that the lower Court erred in determining that the interests of the judiciary were paramount.

In announcing its views as to desirable public policy, the District Court -- although it found the evidence sought "relevant" to the Committee's functions (JA 164) -- declared that "It has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest." JA 166. We have, of course, demonstrated above (p.16) that it is not the function of a Court "to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes", Hutcheson v. United States, supra at 619. But, in any event, the conclusion that the Committee does not have a pressing need for the evidence sought is, we respectfully submit, contrary to the undisputed evidence at hand.

The legislative interests supporting disclosure of the evidence sought are powerful and pervasive. Where wrongdoing in the highest executive offices has possibly occurred, it is vital that Congress be able to consider intelligently the need for corrective legislation to prevent its reoccurrence. As explained in McGrain v. Daugherty, supra -- which sustained a Senate investigation of the Justice Department's role in the Teapot Dome scandal -- Congress' investigatory power is essential to the law-making function, for without information it is impossible to legislate wisely or effectively. */ And, as the Supreme Court pointed out in Watkins v. United States, supra, investigation of executive wrongdoing serves other values as well:

"There is a power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government where he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id., at 303. From the earliest times in its history, the

* In McGrain the Court said (p. 175):
" . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."

See also Sinclair v. United States, 279 U.S. 263 (1929)

Congress has assiduously performed an 'informing function' of this nature." 354 U.S. at 200, n.33. */

The above principles fully sustain the Committee's efforts to obtain the information sought here. The Committee is charged with investigating allegations of serious wrongdoing at the highest executive levels in connection with the 1972 presidential campaign and election and is instructed to consider the need for corrective legislation. The evidence which the Committee seeks from defendant President is vital to the completion of its work. In the words of McGrain v. Daugherty, supra at 177, presidential elections are "⟨p⟩lainly ⟨a subject⟩ on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."

*/ These principles were recently reaffirmed in In Re: Application of United States Senate Select Committee on Presidential Campaign Activities 361 F. Supp. 1270, 1281-82 (D.D.C. 1973). In United States v. Rumely, 345 U.S. 41 (1953), the Supreme Court termed the congressional informing function "indispensable" and again quoted Woodrow Wilson with approval:

" 'It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.' Wilson, Congressional Government, 303." Id. at 43.

The Committee has received conflicting evidence as to the extent of wrongdoing at the pinnacle of government, much of it through testimony authorized by the President himself. As our Statement demonstrates, there has been serious, potentially credible evidence presented to the Committee tending to show that the Chief Executive himself was engaged in wrongdoing. See paras. 9, 11-15. JA 113-22. There has also been evidence tending to exonerate him of such charges. JA 114. And the extent of wrongdoing by other high officials is also the subject of sharply conflicting evidence. Although the pertinent evidence already obtained consists in considerable part of conflicting testimony by witnesses regarding their conversations with the President, the Committee's investigations have revealed the existence of the tape recordings of presidential conversations that it has now subpoenaed. This evidence, which bears directly on matters in dispute and appears the best evidence in that regard, would prove of immense, perhaps decisive, value in determining the extent of malfeasance in the executive branch.

An informed and accurate determination by the Committee of the extent of executive wrongdoing would be of great importance to Congress in deciding the need for and the form of corrective legislation respecting the conduct of political campaigns. Most particularly, it would aid in a determination whether legislative regulation of presidential involvement in

political campaigns is necessary. */ Moreover, revelation of the extent of corruption in the executive branch could help engender the public support needed for basic reforms in our electoral system. If Presidential involvement were shown, there might arise a strong public mandate for thoroughgoing reforms; if no Presidential involvement were revealed, the public and the Congress might be satisfied that lesser measures were adequate. **/

The evidence sought is also important to Congress' discharge of its "informing function." We contend that the people have a right to know whether or not the nation's highest officials were engaged in wrongdoing. ***/ Moreover, so long

*/ To employ the language of the Supreme Court in *Hutcheson v. United States*, supra at 617 (1962):

"If these suspicions /as to the involvement of the President and his associates in wrongdoing/ were founded, they would . . . support /t/ remedial federal legislation."

See further *McGrain v. Daugherty*, supra at 175; *Shelton v. United States*, supra at 404 F. 2d at 1296. Even if the subpoenaed tapes would not be made public at this time, as suggested in Section III below, the Committee needs this material at hand in order to determine what legislative recommendations it will eventually put forward. It is not unusual for a Congressional Committee to keep confidential sensitive information obtained in its investigations.

**/It is, of course, obvious that the other two major bodies Investigating "Watergate" -- the grand jury and the House Judiciary Committee -- have no similar law-making mission.

***As the Court said in Watkins (p. 200): "The public is, of course, entitled to be informed concerning the workings of its government." As Watkins makes clear, this observation has special impact where governmental corruption may be involved. This informing function can be fulfilled even if the Court orders the institution of a protective order as suggested in Section III below because the tapes at least would be in the public domain and would, at some time, be made public and not forever hidden from the nation.

as the executive is allowed to resist full disclosure of evidence bearing on its own possible wrongdoing, public confidence in the self-corrective processes of government will remain at low ebb. And public revelation of all Watergate facts is needed to deter repetition in the future of wrongdoing by governmental officials. */

It is not merely the plaintiff Committee that has concluded that the evidence sought here is vital to Congress. By the adoption of S. Res. 194, the entire Senate has unanimously endorsed the Committee's efforts to obtain such evidence. The Resolution states that the Senate "approves and ratifies the committee's issuance" of the subpoena involved here, and also "approves and ratifies" the Committee's institution of this litigation to achieve compliance with that subpoena. The Resolution further provides that:

*/ Also, as noted by the Court of Appeals in Nixon v. Sirica, 487 F. 2d at 705, the integrity of Congress' own processes is at stake here, for the conflicts in the testimony of witnesses before the Committee raise a serious question whether perjury has been committed. The evidence sought by the Committee would be of vital importance in resolving that question. A committee not concerned with the integrity of its own processes would be both foolish and derelict.

The District Court states (JA 168), that "It is to suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective in this matter." We mean no criticism of the judicial branch but do contend that we have a Constitutional responsibility to inform the Congress and the public of wrongdoing in government that is not vitiated simply because the wrongdoing involved is also being examined by the judicial process. The informing function rests primarily with the Congress, not the Courts, and there is no assurance that all relevant facts relating to the Watergate affair will emerge through the judicial process because of the possibility of guilty pleas, the strictures of the rules of evidence, etc. We fear that the lower Court's ruling, if allowed to stand, would place future Congressional investigations into executive corruption at the mercy of the executive who could, at any time, institute a grand jury to explore the matters of Congressional interest and thus foreclose legislative scrutiny.

"The select committee and its members, by issuing subpoenas to the President and instituting and pursuing litigation to achieve compliance with those subpoenas, were and are acting to determine the extent of possible illegal, improper, or unethical conduct in connection with the Presidential campaign and election of 1972 by officers or employees of the executive branch of the United States Government or other persons. It is the sense of the Senate that, in so doing, the select committee and its members were and are engaged in the furtherance of valid legislative purposes, to wit, a determination of the need for and scope of corrective legislation to safeguard the processes by which the President of the United States is elected and, in that connection, the informing of the public of the extent of illegal, improper, or unethical activities that occurred in connection with the Presidential campaign and election of 1972 and the involvement of officers or employees of the executive branch or others therein. It is further the sense of the Senate that the materials sought by the committee's subpoenas are of vital importance in determining the extent of such involvement and in determining the need for and scope of corrective legislation.* (emphasis added)

In addition, the entire Congress has enacted Public Law 93-190, empowering the Committee to maintain and the Courts to entertain litigation to enforce the subpoena previously issued by the Committee to the President. Under the circumstances, the statute represents a Congressional recognition of the public importance of the materials sought; it is, moreover, certainly arguable that a Congress that did not support the Committee's efforts to achieve the materials subpoenaed would not have passed a statute that aids it in doing so. The Senate, of course, is supportive, as demonstrated by S. Res. 194. In

* Senator Ervin, in his affidavit to the District Court (attached to the Supplemental Memorandum In Support Of Plaintiffs' Motion For Summary Judgment), also described the evidence sought by the subpoena as "vital to the exercise of the Committee's functions." See para. (2) of that affidavit.

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assessing the public interest in disclosure, these actions by the elected representatives of the people are, we submit, entitled to great deference. But the District Court did not refer to S. Res. 194 in its opinion and did not deal with the import of that Resolution and Public Law 93-190 to the present case.

Moreover, we submit, with all deference to the District Court, that the danger of pretrial publicity that might result from release of the tapes to the Committee is both ill-defined and unsubstantial. As observed, the District Judge asked the Special Prosecutor, who obviously has a vital interest in fair trials, to comment on the potential dangers of pretrial publicity if the tapes were released to the Committee. It is significant that the perception of the dangers inherent in release of the tapes to the Committee held by the Special Prosecutor, who has heard the tapes as Judge Gesell has not (JA 154, 166), is substantially less dire than the lower Court's. The essence of the Special Prosecutor's response (JA 159) to the Court's request is contained in the following paragraph:

"We are confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair and prompt trial. Against this background, the Special Prosecutor can say no more than that compliance with the subpoena might provide prospective defendants with one more discrete incident to cite in support of a claim of prejudicial pre-trial publicity. Accordingly, we take no position on whether the Court, if the Senate Select Committee subpoena is otherwise enforceable, should consider the danger of prejudicial pre-trial publicity a decisive factor." (emphasis added)

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The Special Prosecutor candidly recognized that, in addition to a Court's powers to achieve fair trials,*/ there are several other factors that minimize the possibility of prejudice respecting any future trials if the Court orders compliance with the subpoena at issue. Thus he suggests (JA 157) that any possible impact would be reduced if the Committee uses the subpoenaed material judiciously. We represent to the Court that the Committee, ever cognizant of the need for fair trials, would voluntarily impose the necessary restrictions on itself as to the employment of this material. The Committee recently postponed scheduled hearings because of the proximity of the Mitchell/Stans trial in New York City. Even more recently it has determined not to hold further public hearings at this time--partially because it does not want to interfere with upcoming Watergate trials. And the Committee has, at the Special Prosecutor's request, postponed the issuance of its final report so as not to hinder any plea bargaining that may take place immediately after the Watergate indictments are issued. Similar self-restraint will be shown in the future if we receive the subpoenaed tapes.**/

*/ As Judge Sirica said in Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1280 (D.D.C. 1973), a Court has a "well-stocked arsenal of measures designed to preserve the integrity of proceedings and the rights of individuals". The Courts, of course, "are not concerned with the fact of publicity but with the assessment of its nature". Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968) cert. denied, 400 U.S. 1022 (1971).

**/ Moreover, as explained in more detail in Section III, this brief, the Committee would be willing to submit to a protective order, if such is deemed necessary by this Court, to ensure that the contents of the tapes are not revealed at a non-judicious time.

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The Special Prosecutor has stated (JA 158) that, because of the massive publicity these conversations have already had resulting from testimony before the Select Committee and otherwise, "any publicity stemming from compliance with the subpoenas would add only marginally to previous publicity." This is of course true because, as this Court observed in Nixon v. Sirica as to four of the conversations at issue here: "The simple fact is that the conversations are no longer confidential." 487 F. 2d at 718. The Special Prosecutor has also referenced this Court's ruling in Nixon v. Sirica (p. 718) that the tapes constitute "the best evidence of the conversations available." We suggest to the Court that, because this "best evidence" would put to rest speculation as to what is on the tapes, the volume of publicity respecting the tapes would actually be reduced by revelation of their contents. And, as the Special Prosecutor noted, the publicity that would flow from release of the tapes would be "largely factual" (JA 158); it would not be the type of inflammatory publicity generated by rigorous cross examination of a hostile witness.

There are yet other factors that would minimize the possible pretrial impact of producing the tapes to the Select Committee. It is possible that many or all the Watergate cases will be resolved by guilty pleas. In such circumstances, any possible prejudice resulting from playing the tapes would be limited or non-existent. */ Moreover, the tapes may be played

*/ It is significant that guilty pleas have been obtained from Dean, Magruder, Porter, LaRue and Segretti even though they testified before the Committee and thus the facts of their respective involvements in "Watergate" were extensively publicized.

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in the Impeachment proceedings (if the House Judiciary Committee is successful in obtaining them) or -- if there are separate trials -- at the first trial of a major White House figure. See the District Court's opinion, JA 164. Any trials following those events would not be effected to any greater degree by production to the Committee of the materials subpoenaed.

In any event, it is not clear what future prosecutions might be prejudiced by playing the tapes or how they might be prejudiced. The Special Prosecutor forthrightly recognizes this, stating " /a/t this time it is impossible to assess the precise impact of such publicity on forthcoming trials," JA 157. The lower Court, itself, made a similar observation, stating that "it is impossible ... to assess the precise impact of publicity on the forthcoming judicial proceedings." JA 167. In fact, the District Court offered no stronger prognosis of the danger to fair trials than the observation that "the risk exists that /publicity/ would bolster contentions that unbiased juries cannot be impaneled for trial" JA 167. */ Moreover, no potential Watergate defendant has lodged a complaint in this case that his trial will be prejudiced by release of the tapes.

*/ This statement echoes the Special Prosecutor's position. The most the Special Prosecutor would say (JA 156-57) is that "airing the recordings . . . would increase the risk that those indicted could contend with more force than presently available that widespread pre-trial publicity prevents the Government from empanelling an unbiased jury for the trial of the offenses charged." This statement could hardly be more cautious and guarded. And, as previously noted, the Special Prosecutor also stated that he is "confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair and prompt trial." JA 159.

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Surely, some vague, possible pretrial impact that may never occur does not outweigh the vital need of the Committee to achieve the tapes in question so it may fulfill its lawmaking and informing functions. The Committee's legislative tasks should not be frustrated by reliance on an admittedly highly speculative assessment of possible pretrial publicity. We must conclude that, if the balancing test promulgated by the lower Court is indeed appropriate, it was misapplied in the present case. */

Our conclusion is bolstered by the fact that Judge Sirica, a jurist who is certainly concerned with avoiding adverse pretrial publicity and will apparently try the main Watergate case, has ruled in the Special Prosecutor's case that the President is free to release publicly the tapes there involved. In Re Grand Jury Subpoena Duces Tecum Issued To Richard M. Nixon (D.D.C. Misc.

No. 47-73, Nov. 14, 1973). In that case Judge Sirica held that:

"If the President thinks it advisable to waive any privilege and make tapes or other material public, he of course is free to do so at any time." File opin. at 2. (emphasis added)

Since the entry of this ruling, Judge Sirica has heard the tapes involved in the Special Prosecutor's case, but apparently not amended this ruling. See the Court's order in this case dated December 19, 1973. There thus seems to be a basic difference of opinion between Judge Sirica, who has heard four of the five tapes here involved, */ and Judge Gesell, who has not.

*/ This case, of course, involves only five tapes conversation -- not other items subpoenaed from the President. Even if some form of balancing of legislative and judicial need is appropriate, this case must be judged on the possible effect release of those five tapes would have, not on the effect that might flow from release of other Presidential material.

**/ The February 28 tape was not involved in the Special Prosecutor's litigation, but was subsequently made available to him.

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III. The Committee, If This Court Disagrees With The Committee's Contentions Above, Will Voluntarily Submit To A Protective Order That Will Allow It To Fulfill Its Legislative Functions And, At The Same Time, Ensure Fair Trials

The Committee submits that its arguments above are dispositive and that full reversal of the lower Court's order is required. If this Court does not agree that reversal is appropriate, we believe a modification of the lower Court's order is appropriate, as now explained.

While there are differences between us and the District Judge as to the new rule of law he has propounded and its application, we appreciate his proper concern for minimizing pretrial publicity.*/ It is a concern the Committee also shares, as evidenced by the postponement of its hearings so as not to interfere with the Mitchell/Stans trial in New York, by its later discontinuance of all hearings for the present in order not to impair in any way the upcoming Watergate trials, and by its decision to seek postponement of its report filing date so as not to hinder plea-bargaining immediately following the Watergate indictments by encouraging possible pretrial publicity defenses. The Committee, however, must also consider other objectives, i.e., the fulfillment of its lawmaking and informing functions, which are also of great social utility.

Respecting its lawmaking functions, the Committee's chief need at this time is to examine the tapes to determine whether drastic legislation respecting presidential campaigns is required and would eventually receive the public support needed for its passage when the contents of the tapes are revealed. The major

*/ The risk of pretrial publicity appears the only reason that the District Court denied enforcement of the Committee's subpoena. This conclusion, of course, was based on the assumption that the Committee would immediately publicly play the tapes.

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concern regarding the informing function is that these tapes be released to the Committee so that at some future time they may be made public and not forever kept secret from the Nation. We have fears that, unless the Committee performs this function, it will not be fulfilled. It is not yet certain whether the tapes will eventually be made public through the criminal process -- the Watergate cases possibly may all be concluded by guilty pleas or the tapes, for one reason or the other, may not be allowed into evidence. There is also no certainty that they will be made public during the Impeachment process. No subpoena is yet issued for these tapes by the House Judiciary Committee and, if issued, it may be dishonored as our Committee's subpoena has been. If a subpoena is refused, it is not assured that the House Judiciary Committee would go to Court to obtain the material sought and, in any event, it has no jurisdictional statute as does the Committee to facilitate litigation. It is thus possible that Judge Sirica's earlier ruling on jurisdiction in this case would serve as a bar to litigation by that body. See 366 F. Supp. 51 (D.D.C. 1973).

These considerations suggest that one feasible course for this Court is to order release of the tapes to the Committee under a stringent protective order to which the Committee, waiving separation of powers considerations, would agree. That order would limit access to the tapes to a severely limited number of persons and would prohibit public revelation of their contents

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at this time.*/ This would allow the Committee presently to fulfill its lawmaking function. It would ensure that the tapes are in the public domain and will not be forever hidden under a cloak of secrecy from the public that has the right, at some time, to know their contents. When it becomes apparent that -- for one reason or the other -- playing the tapes publicly will not present the possibility of pretrial prejudice, or when there is some other pressing reason that the contents of the conversations be revealed, the Committee would move the District Court to lift the order.

This procedure should satisfy the lower Court's only concern -- that the tapes would be played "in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings." JA 169. Even the District Court, in dismissing the action "without prejudice," recognized that there could come a time when release of the tapes to Committee would, under its view of the law, be permissible.**/

*/ The Special Prosecutor raised the idea of a protective order below, but the District Court declined to follow that suggestion.

**/ The lower Court's implicit suggestion that the Committee could bring a new lawsuit at a later date is wholly unworkable. The Committee has a short life span and needs the tapes immediately to fulfill its lawmaking functions. Moreover, the President, in a new suit, would have 60 days to answer and the litigation -- with the inevitable appeal -- would surely be protracted long beyond the Committee's expiration date. We do not perceive why the District Court, under its theory of the case, found it necessary to dismiss the case (JA 170) instead of only denying the motion for summary judgment with leave to renew. The defendant had not moved for dismissal. In any event, the Court's action in requiring a new lawsuit when circumstances change places plaintiffs in an impossible situation because of the Committee's fast approaching expiration date.

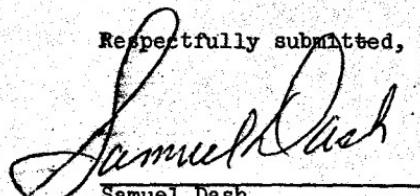
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Thus the District Court -- even if it is correct in its view of the law -- has gone further than necessary to ensure that possible pretrial publicity be minimized. This court should, at the least, require modification of the order of the lower Court to provide that the tapes be released to the Committee under a protective order as described above. Such a ruling would properly avoid "needless friction" with a coordinate branch (see Sanders v. McClellan, supra, 150 U.S. App. D.C. at 63; Ansara v. Eastland, supra, 143 U.S. App. D.C. at 31) and allow the Committee to perform the vital functions entrusted to it by the Senate and the Constitution.

Conclusion

The judgment of the District Court should be reversed or modified in accordance with the suggestions set forth above.

Respectfully submitted,



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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its
own name and in the name of the
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. GURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities

No. 74-1258

Appellants

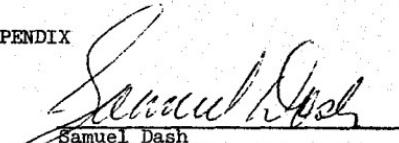
v.

RICHARD M. NIXON, individually and as
President of the United States

Appellee

Appeal from the District Court of the District of Columbia

JOINT APPENDIX



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JOINT APPENDIX

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Complaint.	August 9, 1973
Answer	August 29, 1973
Plaintiff's Motion for Summary Judgment	August 29, 1973
Order dismissing plaintiffs' action with prejudice. .	October 17, 1973
Notice of Appeal	October 19, 1973
Remand Order of Court of Appeals	December 28, 1973
Amendment to Complaint	January 7, 1974
Amended Answer	January 17, 1974
Order Requesting Response from President.	January 25, 1974
Order Requesting Response from Special Prosecutor. .	January 25, 1974
Order Denying Enforcement of Subpena for Documents, etc.	January 25, 1974
Memorandum and Order dismissing action without prejudice	February 8, 1974
Notice of Appeal	February 20, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its own
name and in the name of the UNITED
STATES,

and

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;
HERMAN E. TALMADGE; DANIEL K. INOUYE;
JOSEPH M. MONTOYA; EDWARD J. GURNEY;
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities.

United States Senate
Washington, D.C. 20510

Civil
Action
No.

Plaintiffs

v.

RICHARD M. NIXON, individually and as
President of the United States.

The White House
Washington, D.C. 20500

Defendant

COMPLAINT FOR DECLARATORY JUDGMENT,
MANDATORY INJUNCTION AND MANDAMUS

1. This action seeks a declaratory judgment, a mandatory injunction and a writ of mandamus to direct Richard M. Nixon, individually and as President of the United States, to comply with two subpoenas duces tecum, duly served upon him by the Senate Select Committee on Presidential Campaign Activities pursuant to its authority under Senate Resolution 60, 93d Congress, 1st Session (1973), attached hereto as Exhibit A.

2. This action arises under Article I of the Constitution of the United States, which vests investigative and legislative powers in the Congress of the United States, and under Article II of the Constitution of the United States, which vests executive powers in the President of the United States.

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Parties

3. The plaintiff Senate Select Committee on Presidential Campaign Activities is a duly authorized and constituted committee of the Senate of the United States. It was created pursuant to S. Res. 60, which was enacted by a unanimous vote of the Senate on February 7, 1973. Under S. Res. 60, the Select Committee is empowered to investigate and study "illegal, improper or unethical activities" in connection with the Presidential campaign and election of 1972 and to determine the necessity of new legislation "to safeguard the electoral process by which the President of the United States is chosen." The Select Committee is further empowered by a standing order of the Senate, Senate Resolution 262, 70th Congress, 1st Session (May 28, 1928), attached hereto as Exhibit B, "to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed on it by the Constitution, resolution of the Senate, or other law."

4. The plaintiffs Senator Sam J. Ervin, Jr., of North Carolina (Chairman), Senator Howard H. Baker, Jr., of Tennessee (Vice Chairman), Senator Herman E. Talmadge of Georgia, Senator Daniel K. Inouye of Hawaii, Senator Joseph M. Montoya of New Mexico, Senator Edward J. Gurney of Florida, and Senator Lowell P. Weicker, Jr., of Connecticut are duly designated members of the plaintiff Senate Select Committee on Presidential Campaign Activities. Each of the aforementioned members of the Select Committee is suing in his official capacity as a member of that Committee.

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5. The defendant Richard M. Nixon is President of the United States and was a candidate for that office in the 1972 Presidential campaign and election. He is sued in both his official and individual capacity.

Jurisdiction

6. The jurisdiction of this Court rests on 28 U.S.C. §1331, granting to this Court "original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." This case arises under the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

7. The jurisdiction of this Court further rests on 28 U.S.C. §1345, granting to this Court "original jurisdiction of all civil actions, suits or proceedings commenced by the United States,..." and on Article III of the Constitution of the United States, vesting in this Court jurisdiction over "Controversies to which the United States is a Party." The plaintiff Select Committee is authorized to bring this suit "on behalf of and in the name of the United States" by virtue of S. Res. 262.

8. The jurisdiction of this Court further rests on 28 U.S.C. §1361, granting to this Court "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

9. The jurisdiction of this Court further rests on the Administrative Procedure Act, 5 U.S.C. §701-706, giving this Court jurisdiction to remedy any "legal wrong" suffered by the plaintiffs as the result of Presidential action for which no

adequate review proceeding is otherwise available.

10. In order to aid and supplement the exercise of this Court's jurisdiction under the foregoing sections of the United States Code and the United States Constitution, the plaintiffs invoke the authority of this Court to render declaratory judgments and grant other relief under 28 U.S.C. §§ 2201 and 2202, and to issue "all writs necessary or appropriate in aid of... /its/ jurisdiction /n/ and agreeable to the usages and principles of law" under 28 U.S.C. §1651.

Statement of Facts

11. By virtue of Sec. 3 (a) (5) of S. Res. 60, the plaintiff Select Committee is empowered

"...to require by subpoena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any private person, firm, or corporation, or any officer or former officer or employee of any political committee or organization to produce for its consideration or for use as evidence in its investigation and study any books, checks, canceled checks, correspondence, communications, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control;..."

12. Pursuant to this section, the plaintiff Select Committee, on July 23, 1973, addressed two subpoenas duces tecum, signed by its Chairman, to "President Richard M. Nixon, The White House, Washington, D.C." which sought specified material within the defendant President's sole possession, custody or control. Both subpoenas were duly served on that date. The two subpoenas, with their proof of service, are attached hereto as Exhibits C and D.

13. The subpoena appended as Exhibit C directed the defendant President to make available to the Select Committee certain specified electronic tapes that recorded personal conversations

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"between President Nixon and John Wesley Dean, III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60." [Emphasis added]

14. The subpoena appended as Exhibit D directed the defendant President to make available to the Select Committee documents and other materials "relating directly or indirectly to an attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60." [Emphasis added]

15. Both of the aforesaid subpoenas were returnable on July 26, 1973, at 10 a.m. at the Caucus Room (Room 318), Old Senate Office Building. Neither on that date nor on any other date has the defendant President complied with the subpoenas or otherwise made available to the Select Committee the materials demanded by the subpoenas. The defendant President's refusal to comply with the subpoenas was announced in a letter of July 25, 1973, which was addressed to Senator Sam J. Ervin, Jr., Chairman of the Select Committee, and received by him on July 26, 1973. (Said letter is appended hereto as Exhibit E.) In justification of his refusal to comply with the subpoenas, the defendant President relied in part on reasons stated in letters dated July 6 and July 23, 1973, from him to the Chairman (which are appended hereto as Exhibits F and G). Thus the defendant President did willfully and intentionally refuse to comply with either subpoena, in whole or in part.

16. At no time has the defendant President moved in this

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Court or any other Court to quash, modify or narrow the scope of either subpoena.

17. At no time has the defendant President denied that he has the sole possession, custody and control of all the materials requested in the aforesaid subpoenas or denied that he is capable of submitting those materials to the Select Committee in compliance therewith. In a letter dated July 23, 1973, to the Chairman of the Select Committee, the defendant President stated that "the tapes, which have been under my sole personal control, will remain so." (See Exhibit G, appended hereto.)

18. The electronic tapes and other materials sought by the aforesaid subpoenas, which relate to alleged criminal acts in connection with the Presidential campaign and election of 1972, are relevant to the subject matters of the Select Committee's investigation pursuant to S. Res. 60. With respect to the tapes, the defendant President, in his letter dated July 23, 1973, to the Chairman of the Select Committee (Exhibit G here-to), has conceded the relevance of those tapes to the Select Committee's investigation, stating:

"The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publically known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways."

Moreover, sworn testimony of John Wesley Dean, III, and H. R. Haldeman before the Select Committee has demonstrated that the subject matter of the five specified conversations falls within the investigatory jurisdiction of the Select Committee. (See Exhibit H hereto.) Furthermore, the defendant President, acting through his Special Counsel, has revealed alleged

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facts demonstrating that the subject matter of these conversations is within the Select Committee's jurisdiction. (See Exhibit I hereto.)

Cause of Action

19. The defendant President's refusal and failure to make available the electronic tapes and other materials in response to the Select Committee's lawfully issued subpoenas are unlawful, unwarranted and in breach of his legal duty to respond to and to comply with such subpoenas.

20. The defendant President's refusal and failure to make available said electronic tapes and other materials cannot be excused or justified by resort to any Presidential power, prerogative or privilege.

21. If there be any doctrine of Presidential power, prerogative or privilege that protects materials in the possession, custody or control of the President, such a doctrine does not extend to the protection of materials relating to alleged criminal acts and thus cannot justify the refusal of the defendant President to respond to or comply with the two subpoenas.

22. If there be any Presidential power, prerogative or privilege that renders confidential and protects materials in the possession, custody or control of the President, that confidentiality has been breached and the alleged power, prerogative or privilege has been waived in regard to certain, if not all, of the materials sought by the Select Committee's subpoenas because the defendant President has himself partially revealed the contents of these materials and has permitted his agents and subordinates, both present and past, to reveal portions or versions of these materials. The breach of confidentiality

and the waiver of any alleged Presidential power, prerogative, or privilege are the result of the following actions (among others):

(a) The defendant President's statement of May 22, 1973, that:

"Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

(The defendant President's entire statement of this date is appended as Exhibit J.)

(b) The communications by the defendant President and his agents asserting that the defendant President would not invoke executive privilege or the attorney client privilege in regard to the testimony of certain present and former aides before the Select Committee. (See, e.g., Exhibit K hereto.)

(c) The communications by the defendant President's counsel to the Select Committee purporting to summarize certain Presidential meetings and telephone conversations with John Wesley Dean, III, which are the subject of Exhibit I.

(d) The defendant President's action in turning over certain of the tapes now under subpoena to H. R. Haldeman, a private citizen, who was instructed by the defendant President that he could listen to them.

23. The investigation of the plaintiff Select Committee is a continuing one, for which the subpoenaed electronic tapes and other materials are vitally and immediately needed if the Select Committee's mandate and responsibilities under S. Res. 60 are to be fulfilled. The defendant President's continuing refusal and failure to comply with the Select Committee's lawful subpoenas are irreparably injuring the work of the Select

Committee and the interests of the United States on whose behalf and in whose name the Select Committee sues. There is no remedy at law adequate and appropriate in the present circumstances to the resolution of this controversy, which is of widespread public interest and concern, and relief through injunction and/or mandamus is therefore in order.

24. This case presents an actual controversy and is therefore appropriate for declaratory and other relief pursuant to 28 U.S.C. §§2201 and 2202.

25. The public interest in, and need for, the swift completion of the functions of the Select Committee and the unique and critical Constitutional considerations raised by the actions of the defendant President warrant expedition of this action at all stages and prompt resolution of the dispute.

Prayer

Wherefore, the plaintiffs pray that:

1. This Court issue a declaratory judgment stating that
 - (a) The two subpoenas duces tecum were lawfully issued by the plaintiff Select Committee, were lawfully served upon the defendant President, and must therefore be responded to, and complied with, by the defendant President.
 - (b) The defendant President may not refuse to respond to, or comply with, said subpoenas on the basis of any claim of separation of powers, executive privilege, Presidential prerogative or otherwise.
 - (c) The defendant President, by his actions in revealing, and in permitting others to reveal, the subject matters of certain of the materials sought by the subpoenas has breached the confidentiality of those materials and has waived any claim to the applicability of doctrines of separation

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of powers, executive privilege or Presidential prerogative respecting those materials.

2. This Court, if such be deemed necessary, issue to the defendant President (a) a writ of mandamus and/or a mandatory injunction, if it be determined that he is withholding the subpoenaed materials in his official capacity, or (b) a mandatory injunction, if it be determined that he is withholding the subpoenaed materials in his personal capacity, directing him to make available to the plaintiff Select Committee all materials designated in the subpoenas.

3. This Court award the plaintiffs such other and further relief as may be deemed just and equitable under the circumstances.

Respectfully submitted,

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93d CONGRESS
1st Session

S. RES. 60

IN THE SENATE OF THE UNITED STATES

FEBRUARY 5, 1973

Mr. ERVIN (for himself and Mr. MANSFIELD) submitted the following resolution; which was ordered to be placed on the calendar.

FEBRUARY 7, 1973

Considered, amended, and agreed to

[Omit the part struck through and insert the part printed in italic]

RESOLUTION

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

1 *Resolved,*

2 SECTION 1. (a) That there is hereby established a
3 select committee of the Senate, which may be called, for
4 convenience of expression, the Select Committee on Presi-
5 dential Campaign Activities, to conduct an investigation and
6 study of the extent, if any, to which illegal, improper, or
7 unethical activities were engaged in by any persons, acting

1 either individually or in combination with others, in the
2 presidential election of 1972, or in any related campaign or
3 canvass conducted by or in behalf of any person seeking
4 nomination or election as the candidate of any political party
5 for the office of President of the United States in such elec-
6 tion, and to determine whether in its judgment any occur-
7 rences which may be revealed by the investigation and study
8 indicate the necessity or desirability of the enactment of new
9 congressional legislation to safeguard the electoral process
10 by which the President of the United States is chosen.

11 (b) The select committee created by this resolution shall
12 consist of ~~five~~ *seven* Members of the Senate, ~~three~~ *four* of
13 whom shall be appointed by the President of the Senate
14 from the majority Members of the Senate upon the recom-
15 mendation of the majority leader of the Senate, and ~~two~~
16 *three* of whom shall be appointed by the President of the
17 Senate from the minority Members of the Senate upon the
18 recommendation of the minority leader of the Senate. For
19 the purposes of paragraph 6 of rule XXV of the Standing
20 Rules of the Senate, service of a Senator as a member, chair-
21 man, or vice chairman of the select committee shall not be
22 taken into account.

23 (c) The select committee shall select a chairman and
24 vice chairman from among its members, and adopt rules of
25 procedure to govern its proceedings. The vice chairman shall
26 preside over meetings of the select committee during the

1 absence of the chairman, and discharge such other responsi-
2 bilities as may be assigned to him by the select committee or
3 the chairman. Vacancies in the membership of the select com-
4 mittee shall not affect the authority of the remaining mem-
5 bers to execute the functions of the select committee and
6 shall be filled in the same manner as original appointments
7 to it are made.

8 (d) A majority of the members of the select committee
9 shall constitute a quorum for the transaction of business, but
10 the select committee may fix a lesser number as a quorum
11 for the purpose of taking testimony or depositions.

12 SEC. 2. That the select committee is authorized and
13 directed to do everything necessary or appropriate to make
14 the investigation and study specified in section 1 (a). With-
15 out abridging or limiting in any way the authority conferred
16 upon the select committee by the preceding sentence, the
17 Senate further expressly authorizes and directs the select
18 committee to make a complete investigation and study of the
19 activities of any and all persons or groups of persons or orga-
20 nizations of any kind which have any tendency to reveal the
21 full facts in respect to the following matters or questions:

22 (1) The breaking, entering, and bugging of the
23 headquarters or offices of the Democratic National Com-
24 mittee in the Watergate Building in Washington, District
25 of Columbia;

1 (2) The monitoring by bugging, eavesdropping,
2 wiretapping, or other surreptitious means of conversa-
3 tions or communications occurring in whole or in part in
4 the headquarters or offices of the Democratic National
5 Committee in the Watergate Building in Washington,
6 District of Columbia;

7 (3) Whether or not any printed or typed or written
8 document or paper or other material was surreptitiously
9 removed from the headquarters or offices of the Demo-
10 cratic National Committee in the Watergate Building in
11 Washington, District of Columbia, and thereafter copied
12 or reproduced by photography or any other means for
13 the information of any person or political committee or
14 organization;

15 (4) The preparing, transmitting, or receiving by
16 any person for himself or any political committee or
17 any organization of any report or information concern-
18 ing the activities mentioned in subdivision (1), (2),
19 or (3) of this section, and the information contained in
20 any such report;

21 (5) Whether any persons, acting individually or
22 in combination with others, planned the activities men-
23 tioned in subdivision (1), (2), (3), or (4) of this
24 section, or employed any of the participants in such
25 activities to participate in them, or made any payments

1 or promises of payments of money or other things of
2 value to the participants in such activities or their fam-
3 ilies for their activities, or for concealing the truth in
4 respect to them or any of the persons having any con-
5 nection with them or their activities, and, if so, the
6 source of the moneys used in such payments, and the
7 identities and motives of the persons planning such ac-
8 tivities or employing the participants in them;

9 (6) Whether any persons participating in any of
10 the activities mentioned in subdivision (1), (2), (3),
11 (4), or (5) of this section have been induced by bri-
12 bery, coercion, threats, or any other means whatsoever
13 to plead guilty to the charges preferred against them in
14 the District Court of the District of Columbia or to
15 conceal or fail to reveal any knowledge of any of the
16 activities mentioned in subdivision (1), (2), (3),
17 (4), or (5) of this section, and, if so, the identities
18 of the persons inducing them to do such things, and the
19 identities of any other persons or any committees or
20 organizations for whom they acted;

21 (7) Any efforts to disrupt, hinder, impede, or sabo-
22 tage in any way any campaign, canvass, or activity con-
23 ducted by or in behalf of any person seeking nomination
24 or election as the candidate of any political party for the
25 office of President of the United States in 1972 by in-

1 filtrating any political committee or organization or head-
2 quarters or offices or home or whereabouts of the person
3 seeking such nomination or election or of any person
4 aiding him in so doing, or by bugging or eavesdropping
5 or wiretapping the conversations, communications,
6 plans, headquarters, offices, home, or whereabouts of the
7 person seeking such nomination or election or of any
8 other person assisting him in so doing, or by exercising
9 surveillance over the person seeking such nomination or
10 election or of any person assisting him in so doing, or by
11 reporting to any other person or to any political com-
12 mittee or organization any information obtained by such
13 infiltration, eavesdropping, bugging, wiretapping, or
14 surveillance;

15 (8) Whether any person, acting individually or in
16 combination with others, or political committee or orga-
17 nization induced any of the activities mentioned in sub-
18 division (7) of this section or paid any of the partici-
19 pants in any such activities for their services, and, if so,
20 the identities of such persons, or committee, or organiza-
21 tion, and the source of the funds used by them to procure
22 or finance such activities;

23 (9) Any fabrication, dissemination, or publication
24 of any false charges or other false information having
25 the purpose of discrediting any person seeking nomina-

1 tion or election as the candidate of any political party
2 to the office of President of the United States in 1972;

3 (10) The planning of any of the activities men-
4 tioned in subdivision (7), (8), or (9) of this section,
5 the employing of the participants in such activities,
6 and the source of any moneys or things of value which
7 may have been given or promised to the participants in
8 such activities for their services, and the identities of
9 any persons or committees or organizations which may
10 have been involved in any way in the planning, pro-
11 curing, and financing of such activities.

12 (11) Any transactions or circumstances relating to
13 the source, the control, the transmission, the transfer,
14 the deposit, the storage, the concealment, the expendi-
15 ture, or use in the United States or in any other coun-
16 try, of any moneys or other things of value collected or
17 received for actual or pretended use in the presidential
18 election of 1972 or in any related campaign or canvass
19 or activities preceding or accompanying such election
20 by any person, group of persons, committee, or orga-
21 nization of any kind acting or professing to act in behalf
22 of any national political party or in support of or in
23 opposition to any person seeking nomination or election
24 to the office of President of the United States in 1972;

1 (12) Compliance or noncompliance with any act
2 of Congress requiring the reporting of the receipt or dis-
3 bursement or use of any moneys or other things of value
4 mentioned in subdivision (11) of this section;

5 (13) Whether any of the moneys or things of value
6 mentioned in subdivision (11) of this section were
7 placed in any secret fund or place of storage for use in
8 financing any activity which was sought to be concealed
9 from the public, and, if so, what disbursement or expend-
10 iture was made of such secret fund, and the identities
11 of any person or group of persons or committee or or-
12 ganization having any control over such secret fund or
13 the disbursement or expenditure of the same;

14 (14) Whether any books, checks, canceled checks,
15 communications, correspondence, documents, papers,
16 physical evidence, records, recordings, tapes, or mate-
17 rials relating to any of the matters or questions the select
18 committee is authorized and directed to investigate and
19 study have been concealed, suppressed, or destroyed by
20 any persons acting individually or in combination with
21 others, and, if so, the identities and motives of any such
22 persons or groups of persons;

23 (15) Any other activities, circumstances, materials,
24 or transactions having a tendency to prove or disprove
25 that persons acting either individually or in combination

1 with others, engaged in any illegal, improper, or un-
2 ethical activities in connection with the presidential
3 election of 1972 or any campaign, canvass, or activity
4 related to such election;

5 (16) Whether any of the existing laws of the
6 United States are inadequate, either in their provisions
7 or manner of enforcement to safeguard the integrity or
8 purity of the process by which Presidents are chosen.

9 SEC. 3. (a) To enable the select committee to make
10 the investigation and study authorized and directed by this
11 resolution, the Senate hereby empowers the select committee
12 as an agency of the Senate (1) to employ and fix the com-
13 pensation of such clerical, investigatory, legal, technical, and
14 other assistants as it deems necessary or appropriate; (2) to
15 sit and act at any time or place during sessions, recesses, and
16 adjournment periods of the Senate; (3) to hold hearings for
17 taking testimony on oath or to receive documentary or physi-
18 cal evidence relating to the matters and questions it is author-
19 ized to investigate or study; (4) to require by subpena or
20 otherwise the attendance as witnesses of any persons who
21 the select committee believes have knowledge or information
22 concerning any of the matters or questions it is authorized to
23 investigate and study; (5) to require by subpena or order
24 any department, agency, officer, or employee of the execu-
25 tive branch of the United States Government, or any private

10

1 person, firm, or corporation, or any officer or former officer
2 or employee of any political committee or organization to
3 produce for its consideration or for use as evidence in its
4 investigation and study any books, checks, canceled checks,
5 correspondence, communications, document, papers, physical
6 evidence, records, recordings, tapes, or materials relating to
7 any of the matters or questions it is authorized to investigate
8 and study which they or any of them may have in their
9 custody or under their control; (6) to make to the Senate
10 any recommendations it deems appropriate in respect to the
11 willful failure or refusal of any person to appear before it in
12 obedience to a subpoena or order, or in respect to the willful
13 failure or refusal of any person to answer questions or give
14 testimony in his character as a witness during his appearance
15 before it, or in respect to the willful failure or refusal of any
16 officer or employee of the executive branch of the United
17 States Government or any person, firm, or corporation, or any
18 officer or former officer or employee of any political committee
19 or organization, to produce before the committee any books,
20 checks, canceled checks, correspondence, communications,
21 document, financial records, papers, physical evidence, rec-
22 ords, recordings, tapes, or materials in obedience to any sub-
23 pena or order; (7) to take depositions and other testimony on
24 oath anywhere within the United States or in any other
25 country; (8) to procure the temporary or intermittent serv-

1 ices of individual consultants, or organizations thereof, in the
2 same manner and under the same conditions as a standing
3 committee of the Senate may procure such services under
4 section 202(i) of the Legislative Reorganization Act of
5 1946; (9) to use on a reimbursable basis, with the prior
6 consent of the Government department or agency concerned
7 and the Committee on Rules and Administration, the serv-
8 ices of personnel of any such department or agency; (10) to
9 use on a reimbursable basis or otherwise with the prior con-
10 sent of the chairman of any other of the Senate committees
11 or the chairman of any subcommittee of any committee of
12 the Senate the facilities or services of any members of the
13 staffs of such other Senate committees or any subcommittees
14 of such other Senate committees whenever the select com-
15 mittee or its chairman deems that such action is necessary or
16 appropriate to enable the select committee to make the in-
17 vestigation and study authorized and directed by this resolu-
18 tion; (11) to have access through the agency of any mem-
19 bers of the select committee or any of its investigatory or
20 legal assistants designated by it or its chairman or the rank-
21 ing minority member, chief majority counsel, minority coun-
22 sel, or any of its investigatory assistants jointly designated by
23 the chairman and the ranking minority member to any data,
24 evidence, information, report, analysis, or document or papers
25 relating to any of the matters or questions which it is author-

12

1 ized and directed to investigate and study in the custody or
2 under the control of any department, agency, officer, or em-
3 ployee of the executive branch of the United States Govern-
4 ment having the power under the laws of the United States
5 to investigate any alleged criminal activities or to prosecute
6 persons charged with crimes against the United States which
7 will aid the select committee to prepare for or conduct the
8 investigation and study authorized and directed by this reso-
9 lution; and (12) to expend to the extent it determines nec-
10 essary or appropriate any moneys made available to it by the
11 Senate to perform the duties and exercise the powers con-
12 ferred upon it by this resolution and to make the investigation
13 and study it is authorized by this resolution to make.

14 (b) Subpenas may be issued by the select committee
15 acting through the chairman or any other member design-
16 nated by him, and may be served by any person designated
17 by such chairman or other member anywhere within the
18 borders of the United States. The chairman of the select
19 committee, or any other member thereof, is hereby author-
20 ized to administer oaths to any witnesses appearing before
21 the committee.

22 (c) In preparing for or conducting the investigation and
23 study authorized and directed by this resolution, the select
24 committee shall be empowered to exercise the powers con-
25 ferred upon committees of the Senate by section 6002 of title

13

1 18 of the United States Code or any other Act of Congress
2 regulating the granting of immunity to witnesses.

3 SEC. 4. The select committee shall have authority to
4 recommend the enactment of any new congressional legis-
5 lation which its investigation considers it is necessary or
6 desirable to safeguard the electoral process by which the
7 President of the United States is chosen.

8 SEC. 5. The select committee shall make a final report of
9 the results of the investigation and study conducted by it
10 pursuant to this resolution, together with its findings and
11 its recommendations as to new congressional legislation it
12 deems necessary or desirable, to the Senate at the earliest
13 practicable date, but no later than February 28, 1974. The
14 select committee may also submit to the Senate such interim
15 reports as it considers appropriate. After submission of its
16 final report, the select committee shall have three calendar
17 months to close its affairs, and on the expiration of such
18 three calendar months shall cease to exist.

19 SEC. 6. The expenses of the select committee through
20 February 28, 1974, under this resolution shall not exceed
21 \$500,000, of which amount not to exceed \$25,000 shall be
22 available for the procurement of the services of individual
23 consultants or organizations thereof. Such expenses shall be
24 paid from the contingent fund of the Senate upon vouchers
25 approved by the chairman of the select committee.

14

- 1 *The minority members of the select committee shall have one-*
- 2 *third of the professional staff of the select committee (includ-*
- 3 *ing a minority counsel) and such part of the clerical staff*
- 4 *as may be adequate.*

S. RES. 262, 70th CONGRESS, 1st SESSION (1928)

Resolved, That hereafter any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law. Such suit may be brought and prosecuted to final determination irrespective of whether or not the Senate is in session at the time the suit is brought or thereafter. The committee may be represented in the suit either by such attorneys as it may designate or by such officers of the Department of Justice as the Attorney General may designate upon the request of the committee. No expenditures shall be made in connection with any such suit in excess of the amount of funds available to the said committee. As used in this resolution, the term "committee" means any standing or special committee of the Senate, or any duly authorized subcommittee thereof, or the Senate members of any joint committee.

Exhibit C

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES
SUBPOENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone messages of the below listed conversations or oral communications, telephonic or personal, between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to the break-ins at the Democratic National Committee offices on or about May 27, 1972, and on or about June 17, 1972, and any efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above incidents at the dates and times of the attached list of conversations:

September 15, 1972	(personal)	5:27 p.m. to 6:17 p.m.
February 28, 1973	(personal)	9:12 a.m. to 10:23 a.m.
March 13, 1973	(personal)	12:42 p.m. to 2:00 p.m.
March 21, 1973	(personal)	10:12 a.m. to 11:55 a.m.
	and	5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the
pains and penalties in such cases made and provided.

To Rufus L. Edmisten/JERRY F. LEWIS
to serve and return.

Given under my hand, by order of the
committee, this 23rd day of July, in the
year of our Lord one thousand nine hundred
and seventy-three.

Sam Nesson, Jr.

Chairman, Senate Select Committee on
Presidential Campaign Activities

PAGE 28

Served on Leonard Garment on behalf of
the President;

Time: 6:45

Date: July 23, 1973

Place: Executive Office Bldg., White House

Rufus L. Edmiston

Terry F. Long

7/23/73

Received on behalf of the President

By: Leonard Garment

Counsel to the President

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES
SUBPOENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all records, or copies of records including but not limited to, documents, logs, records, memoranda, correspondence, news summaries, datebooks, notebooks, photographs, recordings or other materials relating directly or indirectly to the attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to, the break-ins of the Democratic National Committee offices on or about May 27, 1972 and on or about June 17, 1972, the surveillance, electronic or otherwise of said offices, and efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above stated matters.

Hereof fail not, as you will answer your default under the
pains and penalties in such cases made and provided.

to Rufus L. Edmisten, JRAY T. LINDEN
to serve and return.

Given under my hand, by order of the
committee, this 23rd day of July, in
the year of our Lord one thousand nine
hundred and seventy-three

Sam J. Ervin Jr.

Chairman, Senate Select Committee on
Presidential Campaign Activities.

Buchanan, Patrick J.

Butterfield, Alexander P.

Campbell, John

Caulfield, Jack

Chapin, Dwight

Colson, Charles

Dean, John

Ehrlichman, John

Fielding, Fred

Haldeman, H. Robert

Higby, Larry

Howard, Richard

Hunt, E. Howard

Kehrli, Bruce

Krogh, Egil

LaRue, Frederick

Liddy, G. Gordon

Magruder, Jeb Stuart

Mitchell, John

Moore, Richard A.

Shumway, DeVan

Strachan, Gordon

Timmons, William

Young, David

Ziegler, Ron

EXHIBIT "C"

PAGE 33

Served on: Leonard Garment, President, received on behalf of the Pres. and
Time: 6:35
Date: July 23, 1973
Place: The White Executive Office, Building, White House

Rufus T. Edmonds

Jerry F. Long
7/23/73

Received on behalf of the President
Sgt: Leonard Garment
Counsel to the President

THE WHITE HOUSE
WASHINGTON

July 25, 1973

Dear Mr. Chairman:

White House counsel have received on my behalf the two subpoenas issued by you, on behalf of the Select Committee, on July 23rd.

One of these calls on me to furnish to the Select Committee recordings of five meetings between Mr. John Dean and myself. For the reasons stated to you in my letters of July 6th and July 23rd, I must respectfully refuse to produce those recordings.

The other subpoena calls on me to furnish all records of any kind relating directly or indirectly to the "activities, participation, responsibilities or involvement" of 25 named individuals "in any alleged criminal acts related to the Presidential election of 1972." Some of the records that might arguably fit within that subpoena are Presidential papers that must be kept confidential for reasons stated in my letter of July 6th. It is quite possible that there are other records in my custody that would be within the ambit of that subpoena and that I could, consistent with the public interest and my Constitutional responsibilities, provide to the Select Committee. All specific requests from the Select Committee will be carefully considered and my staff and I, as we have done in the past, will cooperate with the Select Committee by making available any information and documents that can appropriately be produced. You will understand, however, I am sure, that it would simply not be feasible for my staff and me to review thousands of documents to decide which do and which do not fit within the sweeping but vague terms of the subpoena.

Honorable Sam J. Ervin

-2-

It continues to be true, as it was when I wrote you on July 6th, that my staff is under instructions to cooperate fully with yours in furnishing information pertinent to your inquiry. I have directed that executive privilege not be invoked with regard to testimony by present and former members of my staff concerning possible criminal conduct or discussions of possible criminal conduct. I have waived the attorney-client privilege with regard to my former Counsel. In my July 6th letter I described these acts of cooperation with the Select Committee as "genuine, extensive and, in the history of such matters, extraordinary." That cooperation has continued and it will continue. Executive privilege is being invoked only with regard to documents and recordings that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President.

I cannot and will not consent to giving any investigatory body private Presidential papers. To the extent that I have custody of other documents or information relevant to the work of the Select Committee and that can properly be made public, I will be glad to make these available in response to specific requests.

Sincerely,



Honorable Sam J. Ervin
Chairman
Select Committee on Presidential
Campaign Activities
United States Senate
Washington, D. C. 20510

Exhibit F

THE WHITE HOUSE
WASHINGTON

The Western White House
San Clemente

July 6, 1973

Dear Mr. Chairman:

I am advised that members of the Senate Select Committee have raised the desirability of my testifying before the Committee. I am further advised that the Committee has requested access to Presidential papers prepared or received by former members of my staff.

In this letter I shall state the reasons why I shall not testify before the Committee or permit access to Presidential papers.

I want to strongly emphasize that my decision, in both cases, is based on my Constitutional obligation to preserve intact the powers and prerogatives of the Presidency and not upon any desire to withhold information relevant to your inquiry.

My staff is under instructions to co-operate fully with yours in furnishing information pertinent to your inquiry. On 22 May 1973, I directed that the right of executive privilege, "as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation," no longer be invoked for present or former members of the White House staff. In the case of my former Counsel, I waived in addition the attorney-client privilege.

These acts of cooperation with the Committee have been genuine, extensive and, in the history of such matters, extraordinary.

- 2 -

The pending requests, however, would move us from proper Presidential cooperation with a Senate Committee to jeopardizing the fundamental Constitutional role of the Presidency.

This I must and shall resist.

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential. I recognize that in your investigation as in others of previous years, arguments can be and have been made for the identification and perusal by the President or his Counsel of selected documents for possible release to the Committees or their staffs. But such a course, I have concluded, would inevitably result in the attrition, and the eventual destruction, of the indispensable principle of confidentiality of Presidential papers.

The question of testimony by members of the White House staff presents a difficult but different problem. While notes and papers often involve a wide-ranging variety and intermingling of confidential matters, testimony can, at least, be limited to matters within the scope of the investigation. For this reason, and because of the special nature of this particular investigation, I have agreed to permit the unrestricted testimony of present and former White House staff members before your Committee.

The question of my own testimony, however, is another matter. I have concluded that if I were to testify before the Committee irreparable damage would be done to the Constitutional principle of separation of powers. My position in this regard is supported by ample precedents with which you are familiar and which need

- 3 -

not be recited here. It is appropriate, however, to refer to one particular occasion on which this issue was raised.

In 1953 a Committee of the House of Representatives sought to subpoena former President Truman to inquire about matters of which he had personal knowledge while he had served as President. As you may recall, President Truman declined to comply with the subpoena on the ground that the separation of powers forbade his appearance. This position was not challenged by the Congress.

It is difficult to improve upon President Truman's discussion of this matter. Therefore, I request that his letter, which is enclosed for the Committee's convenience, be made part of the Committee's record.

The Constitutional doctrine of separation of powers is fundamental to our structure of government. In my view, as in the view of previous Presidents, its preservation is vital. In this respect, the duty of every President to protect and defend the Constitutional rights and powers of his Office is an obligation that runs directly to the people of this country.

The White House staff will continue to cooperate fully with the Committee in furnishing information relevant to its investigation except in those instances where I determine that meeting the Committee's demands would violate my Constitutional responsibility to defend the office of the Presidency against encroachment by other Branches.

At an appropriate time during your hearings, I intend to address publicly the subjects you are considering. In the meantime, in the context of Senate Resolution 60, I consider it my Constitutional responsibility to decline to appear personally under any circumstances before your Committee or to grant access to Presidential files.

I respect the responsibilities placed upon you and your colleagues by Senate Resolution 60. I believe you and

- 4 -

your Committee colleagues equally respect the responsibility placed upon me to protect the rights and powers of the Presidency under the Constitution.

Sincerely,



Honorable Sam J. Ervin, Jr.
Chairman
Select Committee on Presidential
Campaign Activities
United States Senate
Washington, D. C. 20510

Enclosure

cc: Honorable Howard H. Baker

THE WHITE HOUSE
WASHINGTON

July 23, 1973

Dear Mr. Chairman:

I have considered your request that I permit the Committee to have access to tapes of my private conversations with a number of my closest aides. I have concluded that the principles stated in my letter to you of July 6th preclude me from complying with that request, and I shall not do so. Indeed the special nature of tape recordings of private conversations is such that these principles apply with even greater force to tapes of private Presidential conversations than to Presidential papers.

If release of the tapes would settle the central questions at issue in the Watergate inquiries, then their disclosure might serve a substantial public interest that would have to be weighed very heavily against the negatives of disclosure.

The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways. Furthermore, there are inseparably interspersed in them a great many very frank and very private comments, on a wide range of issues and individuals, wholly extraneous to the Committee's inquiry. Even more important, the tapes could be accurately understood or interpreted only by reference to an enormous number of other documents and tapes, so that to open them at all would begin an endless process of disclosure and explanation of private Presidential records totally unrelated to Watergate, and highly confidential in nature. They are the clearest possible example of why Presidential documents must be kept confidential.

Accordingly, the tapes, which have been under my sole personal control, will remain so. None has been transcribed or made public and none will be.

On May 22nd I described my knowledge of the Watergate matter and its aftermath in categorical and unambiguous terms that I know to be true. In my letter of July 6th, I informed you that at an appropriate time during the hearings I intend to address publicly the subjects you are considering. I still intend to do so and in a way that preserves the Constitutional principle of separation of powers, and thus serves the interests not just of the Congress or of the President, but of the people.

Sincerely,



Honorable Sam J. Ervin, Jr.
Chairman
Select Committee on Presidential
Campaign Activities
United States Senate
Washington, D. C. 20510

Exhibit H

This Exhibit consists of excerpts from the sworn testimony of John Wesley Dean, III, and H. R. Haldeman before the Select Committee at public session. The relevant portions of the transcript are marked with brackets; the dates of the conversations involved are added to the right-hand margin.

(DEAN)

dfm3

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document was forwarded directly to, or reviewed by, the President. I later learned that the President was pleased and wanted a full follow-up on the items in the memorandum. The markings on the memo are Mr. Haldeman's markings.

It was also about this time, later July -- early September, that I learned during a meeting in Mitchell's office that Mr. Rhoomer McPhee was having private discussions with Judge Richay regarding the civil suit filed by the Democrats. I believe this fact was known to Mr. Mitchell, Mr. LaRue, Paul O'Brien, and Ken Parkinson (and later again by McPhee), that Judge Richay was going to be helpful whenever he could. I subsequently talked with Mr. McPhee about this, as late as March 2nd of this year, when he told me he was going to visit the Judge in the Judge's rose garden over the weekend to discuss an aspect of the case.

Sept.
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On September 15th the Justice Department announced the handing down of the seven indictments by the Federal Grand Jury investigating the Watergate. Late that afternoon I received a call requesting me to come to the President's oval office. When I arrived at the oval office I found

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Haldeman and the President. The President asked me to sit down. Both men appeared to be in very good spirits and my reception was very warm and cordial. The President then told me that Bob -- referring to Haldeman -- had kept him posted on my handling of the Watergate case. The President told me I had done a good job and he appreciated how difficult a task it had been and the President was pleased that the case had stopped with Liddy. I responded that I could not take credit because others had done much more difficult things than I had done. As the President discussed the present status of the situation I told him that all that I had been able to do was to contain the case and assist in keeping it out of the White House. I also told him that there was a long way to go before this matter would end and that I certainly could make no assurances that the day would not come when this matter would start to unravel.

Early in our conversation the President said to me that former FBI Director Hoover had told him shortly after he had assumed office in 1969 that his campaign had been bugged in 1968. The President said that at some point we should get the facts out on this and use this to counter the problems that we were encountering.

The President asked me when the criminal case would come to trial and would it start before the election. I told the President that I did not know. I said that the Justice

1 Department had held off as long as possible the return of
2 the indictments, but much would depend on which judge got
3 the case. The President said that he certainly hoped that the
4 case would not come to trial before the election.

5 The President then asked me about the civil cases that
6 had been filed by the Democratic National Committee and the
7 common cause case and about the counter suits that we had filed.
8 I told him that the lawyers at the Re-Election Committee
9 were handling those cases and that they did not see the common
10 cause suit as any real problem before the election because
11 they thought they could keep it tied up in discovery
12 proceedings. I then told the President that the lawyers at
13 the Re-Election Committee were very hopeful of slowing down
14 the civil suit filed by the Democratic National Committee
15 because they had been making ex parte contacts with the judge
16 handling the case and the judge was very understanding and
17 trying to accommodate their problems. The President was pleased
18 to hear this and responded to the effect that "Well, that's
19 helpful." I also recall explaining to the President about the
20 suits that the Re-Election Committee lawyers had filed against
21 the Democrats as part of their counter-offensive.

22 There was a brief discussion about the potential
23 hearings before the Patman Committee. The President asked me
24 what we were doing to deal with the hearings and I reported
25 that Dick Cook, who had once worked on Patman's Committee

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staff, was working on the problem. The President indicated that Bill Timmons should stay on top of the hearings, that we did not need the hearings before the election.

The conversation then moved to the press coverage of the Watergate incident and how the press was really trying to make this into a major campaign issue. At one point in this conversation I recall the President telling me to keep a good list of the press people giving us trouble, because we will make life difficult for them after the election. The conversation then turned to the use of the Internal Revenue Service to attack our enemies. I recall telling the President that we had not made much use of this because the White House did not have the clout to have it done, that the Internal Revenue Service was a rather democratically-oriented bureaucracy and it would be very dangerous to try any such activities. The President seemed somewhat annoyed and said that the Democratic Administrations had used this tool well and after the election we would get people in these agencies who would be responsive to the White House requirements.

The conversation then turned to the President's post-election plans to replace people who were not on our team in all the agencies. It was at this point that Haldeman, I remember, started taking notes and he also told the President that he had been developing information on which people should stay and which should go after the election. I recall that

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several days after my meeting with the President, I was talking to Dan Kingsly, who was in charge of developing the list for Haldeman as to people who should be removed after the election. I told Kingsly that this matter had come up during my conversation with the President and he said he had wondered what had put new life into his project as he had received several calls from Higby about the status of his project within the last few days. The meeting ended with a conversation with the President about a book I was reading.

I left the meeting with the impression that the President was well aware of what had been going on regarding the success of keeping the White House out of the Watergate scandal and I also had expressed to him my concern that I was not confident that the cover-up could be maintained indefinitely.

I would next like to turn to the White House efforts to block the Patman Committee hearings. As early as mid-August, 1972, the White House learned through the Congressional relations staff that an investigation was being conducted by the staff of the House Banking and Currency Committee, under the direction of Chairman Patman, into many aspects of the Watergate incident. The focus of the investigation at the outset was the funding of the Watergate incident, and other possible illegal funding that may have involved banking violations. The White House concern was two-fold: First, the

Kingsley would have recruited the most advanced pre-election

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what had already been reported to me by Haldeman, that he had told Senator Baker that he would not permit White House staff to appear before the Select Committee, rather he would only permit the taking of written interrogatories. He asked me if I agreed with this and I said that written interrogatories were something that could be handled whereas appearances might create serious problems. He told me he would never let Haldeman and Erlichman go to the Hill. He also told me that Senator Gurney would be very friendly to the White House and that it would not be necessary to contact him because the President said Senator Gurney would know what to do on his own. On the way out of his office he told me I had done an excellent job of dealing with this matter during the campaign; that it had been the only issue that McGovern had had and the Democrats had tried to make something out of it but to no avail. I told him as we were walking together out of the office that I had only managed to contain the matter during the campaign, but I was not sure it could be contained indefinitely. He then told me that we would have have to fight back and he was confident that I could do the job.

Feb. 28

The meeting on February 28th with the President.

I had received word before I arrived at my office that the President wanted to see me. He asked me if I had talked to the Attorney General regarding Senator Baker. I told him that the Attorney General was scheduling to meet with both Senator

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Ervin and Senator Baker, but that a meeting date had not yet been firmed up. I told him that I knew it was the Attorney General's wish to turn over the FBI investigation and the President said that he did not think we should, but asked me what I thought of the idea. I told him that I did not think that there was much damaging information in the FBI investigation, although there could be some bad public relations from it. He told me to think about this matter. He also said that he had read in the morning paper about the Vesco case and asked me what part, if any, his brother Ed had had in the matter. I told him what I knew of his brother's involvement, which was that he was an innocent agent in the contribution transaction. We then discussed the leak to Time magazine of the fact that the White House had placed wiretaps on newsmen and White House staff people. The President asked me if I knew how this had leaked. I told him that I did not; that I knew several people were aware of it, but I did not know any who had leaked it. He asked me who knew about it. I told him that Mr. Sullivan had told me that he thought that Director Hoover had told somebody about it shortly after it happened because Hoover was against it and that Sullivan said that he had heard that this information had gone to Governor Rockefeller and in turn had come back from Governor Rockefeller to Dr. Kissinger. We then talked about the executive privilege statement and the President expressed his desire to get the

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1 statement out well in advance of the Watergate hearings so
2 that it did not appear to be in response to the Watergate
3 hearings. We also discussed Mr. Mollenhoff's interest in the
4 Fitzgerald case, and he asked me to look into the matter for
5 Mr. Mollenhoff. Before departing his office, he again raised
6 the matter that I should report directly to him and not through
7 Haldeman and Ehrlichman. I told him that I thought he should
8 know that I was also involved the post-June 17th activities
9 regarding Watergate. I briefly described to him why I thought
10 I had legal problems, in that I had been a conduit for many
11 of the decisions that were made and, therefore, could be
12 involved in an obstruction of justice. He would not accept my
13 analysis and didnot want me to get into it in any detail other
14 than what I had just related. He reassured me not to worry,
15 that I had no legal problems. (I raised this on another
16 occasion with the President, when Dick Moore was present.)

17 Meeting of March 1st:

18 The first meeting on this date and the afternoon meeting
19 which occurred on March 1st, related to preparing the
20 President for his forthcoming press conference. The President
21 asked me a number of questions about the Gray nomination hearings
22 and facts that had come out during these hearings. In particular,
23 I can recall him stating that there should be no problem with
24 the fact that I had received the FBI reports. He said that I
25 was conducting an investigation for him and that it would be

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1 The phone conversation of March 10th. The President
2 called me to tell me that he felt we should get the
3 Executive privilege statement out immediately; that this
4 should be done before I was called before the Senate
5 Judiciary Committee in connection with the Gray hearings so
6 that it would not appear that the statement on Executive
7 privilege was in response to the action by the Senate
8 Committee.

Mar.
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9 The meeting of March 13th. This was a rather lengthy
10 meeting, the bulk of which was taken up by a discussion about
11 the Gray hearings and the fact that the Senate Judiciary
12 Committee had voted to invite me to appear in connection with
13 Gray's nomination. It was at this time we discussed the
14 potential of litigating the matter of Executive privilege and
15 thereby preventing anybody from going before any Senate
16 Committee until that matter was resolved. The President liked
17 the idea very much, particularly when I mentioned to him that
18 it might be possible that he could also claim attorney/client
19 privilege on me so that the strongest potential case on
20 Executive privilege would probably rest on the counsel to the
21 President. I told him that obviously, this area would have
22 to be researched. He told me that he did not want Haldeman
23 and Ehrlichman to go before the Ervin hearings and that if we
24 were litigating the matter on Dean, that no one would have to
25 appear. Toward the end of the conversation, we got into a

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1 discussion of Watergate matters specifically. I told the
2 President about the fact that there were money demands being
3 made by the seven convicted defendants, and that the
4 sentencing of these individuals was not far off. It was
5 during this conversation that Haldeman came into the office.
6 After this brief interruption by Haldeman's coming in, but
7 while he was still there, I told the President about the fact
8 that there was no money to pay these individuals to meet
9 their demands. He asked me how much it would cost. I told
10 him that I could only make an estimate that it might be as
11 high as a million dollars or more. He told me that that
12 was no problem, and he also looked over at Haldeman and
13 repeated the same statement. He then asked me who was
14 demanding this money and I told him it was principally coming
15 from Hunt through his attorney. The President then referred
16 to the fact that Hunt had been promised Executive clemency.
17 He said that he had discussed this matter with Ehrlichman
18 and contrary to instructions that Ehrlichman had given Colson
19 not to talk to the President about it, that Colson had also
20 discussed it with him later. He expressed some annoyance at
21 the fact that Colson had also discussed this matter with him.

22 The conversation then turned back to a question from the
23 President regarding the money that was being paid to the
24 defendants. He asked me how this was done. I told him I
25 didn't know much about it other than the fact that the money

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1 was laundered so it could not be traced and then there were
2 secret deliveries. I told him I was learning about things I
3 had never known before, but the next time I would certainly
4 be more knowledgeable. This comment got a laugh out of
5 Haldeman. The meeting ended on this note and there was no
6 further discussion of the matter and it was left hanging just
7 as I have described it.

8 The meetings on March 14th. The meetings which occurred
9 on this day principally involved preparing the President
10 for a forthcoming press conference. I recall talking about
11 Executive privilege and making Dean a test case in the
12 courts on Executive privilege. The President said that he
13 would like very much to do this and if the opportunity came
14 up in the press conference, he would probably so respond.
15 I also recall that during the meetings which occurred on this
16 day, that the President was going to try to find an answer
17 that would get Ziegler off the hook of the frequent questions
18 asked him regarding the Watergate. He said that he was going
19 to say that he would take no further questions on the Water-
20 gate until the completion of the Ervin hearings and that
21 Ziegler in turn could repeat the same statement and avoid
22 future interrogation by the press on the subject.

23 The meeting on March 15th. It was late in the afternoon
24 after the President's press conference that he asked Dick Moore
25 and I to come over to visit with him. He was in a very

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possible about the Watergate matter because I did not think
that he fully realized all the facts and the implication of
those facts for people at the White House as well as himself.
He said that I should meet with him the next morning about
10 o'clock.

Before going in to tell the President some of these
things, I decided I should call Haldeman because I knew that
his name would come up in the matter. I called Haldeman and
told him what I was going to do and Haldeman agreed that I
should proceed to so inform the President of the situation.

Mar.

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(morning)

The meeting of March 21st. As I have indicated, my
purpose in requesting this meeting particularly with the
President was that I felt it necessary that I give him a full
report of all the facts that I knew and explain to him what I
believed to be the implication of those facts. It was my
particular concern with the fact that the President did not
seem to understand the implications of what was going on. For
example, when I had earlier told him that I thought I was
involved in an obstruction of justice situation he had argued
with me to the contrary after I had explained it to him. Also,
when the matter of money demands had come up previously he had
very nonchalantly told me that that was no problem and I did
not know if he realized that he himself could be getting
involved in an obstruction of justice by having promised
clemency to Hunt. What I had hoped to do in this conversation

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was to have the President tell me that we had to end the
matter -- now. Accordingly, I gave considerable thought to
how I would present this situation to the President and try
to make as dramatic a presentation as I could to tell him how
serious I thought the situation was that the cover-up
continue.

I began by telling the President that there was a cancer
growing on the Presidency and that if the cancer was not removed
that the President himself would be killed by it. I also told
him that it was important that this cancer be removed
immediately because it was growing more deadly every day.
I then gave him what I told him would be a broad overview of
the situation and I would come back and fill in the details
and answer any questions he might have about the matter.

I proceeded to tell him how the matter had commenced in
late January and early February but that I did not know how
the plans had finally been approved. I told him I had
informed Haldeman what was occurring, and Haldeman told me I
should have nothing to do with it. I told him that I had
learned that there had been pressure from Colson on McGruder
but I did not have all the facts as to the degree of pressure.
I told him I did not know if Mitchell had approved the

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1 planes but I had been told that Mitchell had been a recipient
2 of the wiretap information and that Haldeman had also received
3 some information through Strachan.

4 I then proceeded to tell him some of the highlights
5 that had occurred during the cover up. I told him that
6 Kalmbach had been used to raise funds to pay these seven
7 individuals for their silence at the instructions of
8 Ehrlichman, Haldeman, and Mitchell and I had been the con-
9 veyor of this instruction to Kalmbach. I told him that after
10 the decision had been made that Magruder was to remain at the
11 Re-election Committee I had assisted Magruder in preparing his
12 false story for presentation to the grand jury. I told him
13 that cash that had been at the White House had been funneled
14 back to the Re-election Committee for the purpose of paying
15 the seven individuals to remain silent.

16 I then proceeded to tell him that perjury had been commi-
17 tted, and for this cover up to continua it would require more
18 perjury and more money. I told him that the demands of the
19 convicted individuals were continually increasing and that
20 with sentencing imminent, the demands had become specific.
21 I told him that on Monday the 19th, I had received a
22 message from one of the Re-election Committee lawyers
23 who had spoken directly with Hunt and that Hunt had sent a
24 message to me demanding money. I then explained to him the
message that Hunt had told Paul O'Brien the preceding Friday

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to be passed on to me. I told the President I'd asked O'Brien why to Dean and O'Brien had asked Hunt the same question. But Hunt had merely said you just pass this message on to Dean. The message was that Hunt wanted \$72,000 for living expenses and \$50,000 for attorney's fees and if he did not get the money and got it quickly that he would have a lot of seamy things to say about what he had done for John Ehrlichman while he was at the White House. If he did not receive the money, he would have to reconsider his options.

I informed the President that I had passed this message on to both Haldeman and Ehrlichman. Ehrlichman asked me if I had discussed the matter with Mitchell. I had told Ehrlichman that I had not done so and Ehrlichman asked me to do so. I told the President I had called Mitchell pursuant to Ehrlichman's request but I had no idea of what was happening with regard to the request.

I then told the President that this was just typical of the type of blackmail that the White House would continue to be subjected to and that I didn't know how to deal with it. I also told the President that I thought that I would as a result of my name coming out during the Gray hearings be called before the grand jury and that if I was called to testify before the grand jury or the Senate Committee I would have to tell the facts the way I know them. I said I did not know if executive privilege would be applicable to any appearance I

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1 might have before the grand jury. I concluded by saying that
2 it is going to take continued perjury and continued support
3 of these individuals to perpetuate the cover-up and that I did
4 not believe it was possible to do continue it; rather I
5 thought it was time for surgery on the cancer itself and that
6 all those involved must stand up and account for themselves
7 and that the President himself get out in front of this matter.

8 I told the President that I did not believe that all
9 of the seven defendants would maintain their silence forever,
10 in fact, I thought that one or more would very likely break
11 rank.

12 After I finished, I realized that I had not really
13 made the President understand because after he asked a few
14 questions, he suggested that it would be an excellent
15 idea if I gave some sort of briefing to the Cabinet and that
16 he was very impressed with my knowledge of the circumstances
17 but he did not seem particularly concerned with their impli-
18 cations.

19 It was after my presentation to the President and
20 during our subsequent conversation the President called
21 Haldeman into the office and the President suggested that we
22 have a meeting with Mitchell, Haldeman and Ehrlichman to dis-
23 cuss how to deal with this situation. What emerged from that
24 discussion after Haldeman came into the office was that John
25 Mitchell should account for himself for the pre-June 17th

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CONT'D

Mar.
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activities and the President did not seem concerned about the activities which had occurred after June 17th.

After I departed the President's office I subsequently went to a meeting with Haldeman and Ehrlichman to discuss the matter further. The sum and substance of that discussion was that the way to handle this now was for Mitchell to step forward and if Mitchell were to step forward we might not be confronted with the activities of those involved in the White House in the cover-up.

Accordingly, Haldeman, as I recall, called Mitchell and asked him to come down the next day for a meeting with the President on the Watergate matter.

Mar.
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(afternoon)

In the late afternoon of March 21st, Haldeman and Ehrlichman and I had a second meeting with the President. Before entering this meeting I had a brief discussion in the President's outer office of the Executive Office Building suite with Haldeman in which I told him that we had to options:

One is that this thing goes all the way and deals with both the pre-activities and the post-activities, or the second alternative; if the cover-up was to proceed we would have to draw the wagons in a circle around the White House and that the White House protect itself. I told Haldeman that it had been the White House's assistance to the re-election committee that had gotten us into much of this problem and now the

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only hope would be to protect ourselves from further involvement.

The meeting with the President that afternoon with Haldeman, Ehrlichman and myself was a tremendous disappointment to me because it was quite clear that the cover-up as far as the White House was concerned was going to continue.

I recall that while Haldeman, Ehrlichman and I were sitting at a small table in front of the President in his Executive Office Building office that I for the first time said in front of the President that I thought that Haldeman, Ehrlichman and Dean were all indictable for obstruction of Justice and that was the reason I disagreed with all that was being discussed at that point in time.

I could tell that both Haldeman, and particularly Ehrlichman, were very unhappy with my comments. I had let them very clearly know that I was not going to participate in the matter any further and that I thought it was time that everybody start thinking about telling the truth.

I again repeated to them I did not think it was possible to perpetuate the cover-up and the important thing now was to get the President out in front.

The meeting of March 22nd: the arrangements had been made to have a meeting after lunch with the President with Ehrlichman, Haldeman, Mitchell and myself. Mr. Mitchell came to Washington that morning for a meeting in Haldeman's

(HALDEMAN)

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1 request and asked him to meet with Ehrlichman that day.
2 I have turned over to the Committee a tape recording of this
3 conversation. At the time we talked, Magruder had
4 already decided to tell the full truth, and in fact, I
5 believe, had done so in a meeting with the U.S. Attorneys.
6 During the phone conversation, Magruder said that his testi-
7 mony had not implicated me. He also said that one of the
8 problems he was facing was that he had committed perjury when
9 he testified before the Grand Jury and the trial. I responded
10 that I did not know anything about that, and he replied that
11 even if I didn't, he did. He did not contradict me, thus show-
12 ing that, at that point in time at least, I did not know he
13 had perjured himself.

14 Turning to the September 15 meeting, I was in meetings
15 with the President all afternoon on September 15, 1972. At
16 the end of the afternoon, the President had John Dean come in.
17 This was the day that the indictments had been brought down
18 in the Watergate case, and the President knew John Dean had been
19 concentrating for a three-month period on the investigation
20 for the White House. I am sure therefore that the President
21 thought it would be a good time to give Dean a pat on the
22 back.

23 There was no mood of exuberance or excitement on the
24 President's part at the time the indictments were brought down.
25 He does not take joy from the misfortunes of other people, and

Sect. 15
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I don't think he found it very pleasant that the people had been indicted. Naturally, however, it was good news as far as the White House and the Administration were concerned that when the indictments were brought down, after a thorough investigation, it had been established there was not any involvement by anyone in the White House. This confirmed what Mr. Dean had been telling us, and we had been reporting to the President over the period of the past three months.

As was the case with all meetings in the Oval Office when the President was there, this meeting with Mr. Dean was recorded. At the President's request, I recently reviewed the recording of that meeting (at which I was present throughout) in order to report on its contents to the President. I should interject here that I also reviewed the recording of the March 21st meeting of the President, Mr. Dean and myself for the same purpose, and I have made reports to the President on both of those meetings. I have not at any time listened to any other recordings of the meetings in the President's office or of the President's phone calls.

The President did not open the meeting of September 15th with the statement that "Bob has kept me posted on your handling of the Watergate" or anything even remotely resembling that. He said, "Hi, this was quite a day, you've got Watergate on the way" or something to that effect. Dean responded that it had been quite a three months and then reported to .

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1 President on how the press was handling the indictments and,
2 apparently, a Clark MacGregor press conference.

3 The discussion then covered the matter of the new bug
4 that had recently been discovered in the Democratic National
5 Committee and the question of whether it had been planted
6 by the DNC and the matter of Mr. Nixon's campaign being bugged
7 in 1968 and some discussion of whether to try to get out evi-
8 dence of that. There was some discussion about Judge Richey
9 hearing the civil case and a comment that he would keep
10 Roemer McPhee abreast of what was happening. I don't recall any
11 comment about the judge trying to accommodate Dean's hopes of
12 slowing down the suit, but there was some discussion about
13 the problem of the civil case depositions interfering with the
14 criminal prosecution -- apparently as a result of a conversa-
15 tion between Judge Richey and Assistant U. S. Attorney Silbert.

16 Dean indicated that the indictments meant the end of the
17 investigation by the Grand Jury and now there would be the
18 GAO audit and some congressional inquiries, such as the
19 Patman committee, but he assured the President that nothing
20 would come out to surprise us. In other words, there was
21 apparently no information that would be harmful that had not
22 been uncovered already. The President did at that point commend
23 Dean for his handling of the whole Watergate matter, which was
24 a perfectly natural thing for him to do. Dean reported that he
25 was keeping a close eye on possible campaign law violations by

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the opposition; said there were some problems of bitterness at the Re-election Committee between the Finance Committee and Political Group; and said he was trying to keep notes on people who were emerging out of all this that were clearly not our friends.

There was, as Mr. Dean has indicated, quite a lengthy discussion of the Patman hearings and the various factors involved in that. There was some discussion of the reluctance of the IRS to follow-up on complaints of possible violations against people who were supporting our opponents because there are so many Democrats in the IRS bureaucracy that they won't take any action.

There was a discussion of cleaning house after the election, moving quickly to replace people at all levels of the Government. The meeting closed, as I recall, with a fairly long philosophical discussion.

I totally disagree with the conclusion that the President was aware of any type of cover-up and certainly Mr. Dean did not advise him of it at the September 15th meeting.

1 Mr. Haldeman. I will proceed then with the addendum on
2 the March 21 meeting. I was present for the final 40 minutes
3 of the President's meeting with John Dean on the morning of
4 March 21. While I was not present for the first hour of the
5 meeting, I did listen to the tape of the entire meeting.

6 Following is the substance of that meeting to the best
7 of my recollection.

8 Dean reported some facts regarding the planning and
9 the break-in of the DNC and said again there were no White
10 House personnel involved. He felt Magruder was fully
11 aware of the operation, but he was not sure about Mitchell.
12 He said that Liddy had given him a full rundown right after Water-
13 gate and that no one in the White House was involved. He
14 said that his only concerns regarding the White House were in
15 relation to the Colson phone call to Magruder which
16 might indicate White House pressure and the possibility that
17 Haldeman got some of the "fruits" of the bugging via Strachan
18 since he had been told the "fruits" had been supplied to
19 Strachan.

20 He outlined his role in the January planning meetings
21 and recounted a report he said he made to me regarding the
22 second of those meetings.

23 Regarding the post-June 17th situation, he indicated
24 concern about two problems, money and clemency. He said that
Colson had said something to Hunt about clemency. He also re-

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5 report any other offers of clemency although he said he felt
6 the defendants expected it. The President confirmed that he
7 could not offer clemency and Dean agreed.

8 Regarding money, Dean said he and Haldeman were in-
9 volved. There was a bad appearance which could be developed
10 into a circumstantial chain of evidence regarding obstruction
11 of justice. He said that Kalmbach had raised money for the
12 defendants; that Haldeman had okayed the return of the \$350,000
13 to the Committee; and that Dean had handled the dealings be-
14 tween the parties in doing this. He said that the money was
15 for lawyers' fees.

16 He also reported on a current Hunt blackmail threat. He
17 said Hunt was demanding \$120,000 or else he would tell about
18 the seamy things he had done for Ehrlichman. The President
19 pursued this in considerable detail, obviously trying to smoke
20 out what was really going on. He led Dean on regarding the
21 process and what he would recommend doing. He asked such things
22 as -- "well, this is the thing you would recommend? we ought
23 to do this? is that right?" and he asked where the money would
24 come from? how it would be delivered? and so on. He asked how much
25 money would be involved over the years and Dean said "probably
a million dollars -- but the problem is that it is hard to
raise." The President said "there is no problem in raising a
million dollars, we can do that, but it would be wrong." I
have the clear impression that he was trying to find out what

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1 it was Dean was saying and what Dean was recommending. He was
2 trying to get Dean's view and he was asking him leading ques-
3 tions in order to do that. This is the method the President
4 often used when he was moving toward a determination.

5 Dean also mentioned his concern about other activities
6 getting out, such as the "Ellsberg" break-in, something re-
7 garding Brookings, the other Hunt activities for Colson on
8 Chappaquiddick, the Segretti matter, use of Kalmbach funds,
9 etc.

10 When I entered the meeting, there was another dis-
11 cussion regarding the Hunt threat and the President again
12 explored in considerable depth the various options and tried
13 to draw Dean out on his recommendation.

14 The meeting then turned to the question of how to deal
15 with this situation and the President mentioned Ehrlichman's
16 recommendation that everybody should go to the Grand Jury.
17 The President told Dean to explore all of this with Haldeman,
18 Ehrlichman and Mitchell.

19 There was no discussion while I was in the room (nor
20 do I recall any discussion on the tape) on the question of
21 clemency in the context of the President saying that he had
22 discussed this with Ehrlichman and with Colson. The only
23 mention of clemency was Dean's report that Colson had dis-
24 cussed clemency with Hunt and the President's statement that
he could not offer clemency and Dean's agreement -- plus a

nashua

Mar. 21
Morning
15

1 a comment that Dean thought the others expected it.

2 Dean mentioned several times during this meeting his aware-
3 ness that he was telling the President things the President had
4 known nothing about.

5 I have to surmise that there is a genuine confusion in
6 Mr. Dean's mind as to what happened on March 13th versus what
7 happened on March 21st, because some of what he describes
8 in quite vivid detail as happening on March 13th did, in fact,
9 happen on March 21st. The point about my laughing at his being
10 more knowledgeable next time, and the question that he says
11 he raised on March 13th regarding the million dollars are so
12 accurately described, up to a point, as to what really happened
13 on March 21st that I believe he is confused between the two
14 dates.

15 Mr. Dean's recollection that the President had told him
16 on March 13 that Ehrlichman had discussed an offer of clemency
17 to Hunt with him and he had also discussed Hunt's clemency
18 with Colson is at total variance with everything that I have
19 ever heard from the President, Ehrlichman or Colson. I don't
20 recall such a discussion in either the March 13 or the March
21 meeting.

22 Now, to the question of impression. Mr. Dean drew
23 the erroneous conclusion that the President was fully knowled-
24 able of the cover-up at the time of the March 13th meeting in
25 the sense (1) of being aware that money had been paid for

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1 silence and that (2) the money demands could reach a million
2 dollars and that the President said that was no problem. He
3 drew his conclusion from a hypothetical discussion of ques-
4 tions since the President told me later that he had no intention
5 to do anything whatever about money and had no knowledge of
6 the so-called cover-up.

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1 to the Committee?

2 Mr. Dash. Reproduced now.

3 Senator Baker. Thank you very much.

4 Senator ERVIN. You may proceed with your original state-
5 ment.

6 Mr. Haldeman. Thank you, sir.

Mar. 21
(afternoon)

7 Mr. Dean, Mr. Ehrlichman and I met with the President
8 later that afternoon of the 21st. That meeting dealt with
9 the questions of the grand jury, the Senate Committee and
10 executive privilege in connection with gathering the facts
11 and getting them out. I think there was some discussion of
12 Ehrlichman's theory that everybody should go to the grand jury,
13 and Dean's reaction that that would be fine as long as we had
14 immunity. Mr. Ehrlichman, as I recall, very strongly shot
15 down that thought from Dean saying it did not make any sense
16 at all. Dean has testified that he argued that the way to get
17 the truth out would be to send everybody to the grand jury with
18 immunity. That, in itself, is rather indicative of the different
19 attitudes. Mr. Ehrlichman was arguing for going to the grand
20 jury without immunity in order to get the truth out. Mr. Dean
21 was arguing for going to the grand jury with immunity to get
22 the truth out.

23 I recall an incident after that afternoon meeting that Mr.
24 Dean also recalls, but he says it took place before and he
25 sees it a little bit differently. I remember that Dean and

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, ET. AL.

Plaintiffs

)
)
)
)
)
)

) Civil
) Action
) No. _____

v.

RICHARD M. NIXON,
INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES)

THE WHITE HOUSE
WASHINGTON, D.C.

Defendant

)
)
)
)

AFFIDAVIT OF FRED D. THOMPSON

Fred D. Thompson, being sworn, deposes and says:

1. Early in June, 1973, the White House transmitted to the Select Committee a memorandum (which is attached to this affidavit) listing certain oral communications, both face-to-face and telephonic, between President Richard M. Nixon and John Wesley Dean III. This memorandum, inter alia, includes the exact times and durations of these communications, and, in the case of face-to-face communications, the other participants, if any, in those conversations.

2. Shortly thereafter, I received a telephone call from J. Fred Buzhardt, Special Counsel to the President. During this telephone call, Mr. Buzhardt related to me his understanding as to the substance of certain portions of the enumerated conversations between the President and Mr. Dean.

3. During my discussion with Mr. Buzhardt, I made detailed notes on the information that he gave me. Upon conclusion of the conversation, I promptly prepared a "Memorandum of Substance of Dean's Calls and Meeting with the President," a copy of which is attached to this affidavit. It is my belief that this memorandum accurately reflects the information imparted to me by Mr. Buzhardt.



Fred D. Thompson

Subscribed and sworn to, before
me, this 9th day of August, 1973



Peter Huber

Notary Public, D.C.

My Commission Expires 14 May, 1978

MEETINGS AND TELEPHONE CONVERSATIONS BETWEEN
THE PRESIDENT AND JOHN W. DEAN, III

No contact between the President and John W. Dean, III, during January, February, and March 1972

April 13, 1972

PM 4:31 4:34 President met with Frank DeMarco, Jr., and John Dean to sign 1971 income tax returns.

May 1, 1972

PM 3:02 3:07 President had photo opportunity in Rose Garden for National Secretaries Week. Mr. Dean attended

No contact between the President and John W. Dean, III, during June and July 1972.

August 14, 1972

PM The President met to sign personal legal documents with:

12:45 1:11	The First Lady
12:49 1:09	John J. Ratchford
12:49 1:11	Mr. Butterfield
12:49 1:11	Mr. Haldeman
12:49 1:12	Mr. Ehrlichman
12:49 1:12	John W. Dean, III
12:49 1:12	John H. Alexander
12:49 1:12	Richard S. Ritzel

No other contact during August 1972

September 15, 1972

PM The President met with:

3:15 6:17 Mr. Haldeman
5:27 6:17 Mr. Dean

(The President talked with Mr. MacGregor by phone from 5:36 to 5:38)

No other contact during September 1972

October 9, 1972

PM 3:10 3:34 The President met with Samuel Newhouse, President of Newhouse Newspapers and Newhouse Broadcasting and Herb Klein.
3:23 3:34 John Dean joined the meeting.

November 8, 1972

The President attended a senior staff meeting in the Roosevelt Room. Mr. John Dean was in attendance.

November 12, 1972

8:40 8:44 The President met aboard "Spirit of '76" with Rose Mary Woods and Mr. and Mrs. John Dean

No contact between the President and John W. Dean, III, during November and December 1972.

January 21, 1973

AM 11:05 12:04 President and First Lady hosted Worship Service.
John Dean attended.

February 27, 1973

PM 3:55 4:20 President met with John Dean alone in Oval Office.

February 28, 1973

AM 9:12 10:23 President met with John Dean in Oval Office.

March 1, 1973

AM 9:18 9:46 President met with his Counsel, John W. Dean, III,
in the Oval Office.

10:36 10:44 President met with Mr. Dean in the Oval Office.

PM 1:06 1:14 President met with Mr. Dean in the Oval Office

March 6, 1973

AM 11:49 12:00 President met with Mr. Dean in the Oval Office.

March 7, 1973

AM 8:53 9:16 President met with Mr. Dean in the Oval Office.

March 8, 1973

AM 9:51 9:54 President met with Mr. Dean in the Oval Office.

March 10, 1973

AM 9:20 9:44 President talked long distance with Mr. Dean.
President initiated the call from Camp David
to Mr. Dean who was in Washington, D. C.

March 13, 1973

PM 12:42 2:00 President met with Mr. Dean in the Oval Office.
(Mr. Haldeman was present from 12:43-12:55)

March 14, 1973

AM 8:36 President telephoned Mr. Dean. The call was not completed.
8:55 8:59 Mr. Dean returned the call and talked with the President.
9:43 10:50 President met with Mr. Dean in the P's EOB Office.
Also present were:
Mr. Kissinger (departed at 9:50)
Ronald L. Ziegler
Richard A. Moore (9:55-10:50)

PM 12:27 12:28 President telephoned Mr. Dean.
12:47 1:30 President met with Mr. Moore and Mr. Dean.
4:25 4:26 President talked with Mr. Dean. (The President initiated the call.)
4:34 4:36 President talked with Mr. Dean. (Mr. Dean initiated the call.)

March 15, 1973

PM 4:36 6:24 President met with Mr. Dean and Mr. Moore in the Oval Office.

March 16, 1973

AM 10:34 11:06 President met with Mr. Dean in the Oval Office.
Mr. Ziegler was present from 10:58-11:10.

PM 8:14 8:23 President talked with Mr. Dean. (The President
initiated the call.)

March 17, 1973

PM 1:25 2:10 President met with Mr. Dean in the Oval Office.

March 19, 1973

PM 4:59 President requested that Mr. Moore and Mr. Dean
join him in his EOB Office.

5:03 5:41 President met with Mr. Moore and Mr. Dean in
his EOB Office.

March 20, 1973

AM 10:46 10:47 President talked with Mr. Dean. (The President
initiated the call.)

PM 12:59 1:00 President talked with Mr. Dean. (The President
initiated the call.)

1:42 2:31 President met with Mr. Dean and Mr. Moore.

7:29 7:43 President talked with Mr. Dean. (The President
initiated the call.)

March 21, 1973

AM 10:12 11:55 President met with Mr. Dean in the Oval Office.
Mr. Haldeman was also present for at least
part of the time

PM 5:20 6:01 President met with Mr. Dean in the President's
EOB office. Also present were:
Mr. Ziegler (departed at 5:25)
Mr. Haldeman
Mr. Ehrlichman (5:25 - 6:01)

March 22, 1973

PM 1:57 3:43 President met with Mr. Dean in the President's
EOB Office. Also present were:
Mr. Ehrlichman (2:00-3:40)
Mr. Haldeman (2:01-3:40)
Mr. Mitchell (2:01-3:43)

March 23, 1973

PM 12:44 1:02 President talked long distance with Mr. Dean.
(The President initiated the call from
Florida to Mr. Dean who was in Washington,
D. C.)

3:28 3:44 President talked long distance with Mr. Dean
(The President initiated the call from
Florida to Mr. Dean who was in Camp
David, Md.)

No contact during the period April 1-14

April 15, 1973

P.M. 9:17 10:12 President met with Mr. Dean in the President's
EOB Office.

April 16, 1973

AM 10:00 10:40 President met with Mr. Dean in Oval Office.

**PM 4:07 4:35 President met with Mr. Dean in the President's
EOB Office.**

**4:04 4:05 President talked with Mr. Dean. (The President
initiated the call.)**

April 17, 1973

**AM 9:19 9:25 President talked with Mr. Dean. (The President
initiated the call.)**

April 22, 1973

AM 8:24 8:39 President phoned Mr. Dean from Key Biscayne.

**MEMORANDUM OF SUBSTANCE OF DEAN'S CALLS
AND MEETINGS WITH THE PRESIDENT**

September 15, 1972

Dean reported on IRS investigation of Larry O'Brien.
Dean reported on Watergate indictments.

February 27, 1973

Discussed executive privilege, minority counsel for Watergate Committee. Dean suggested White House aides submit answers to interrogatories.

February 28, 1973.

President inquired of Watergate, Dean said no White House involvement, Stans was victim of circumstances, Colson was lightning rod because of his reputation. Discussed wiretappings which had been brought up in the Gray hearings. Sullivan, Deputy Director, was friend of Dean and Dean suggested they make sure that wiretaps of prior years (other Administrations) be made known.

March 1, 1973

Preparation for press conference -- go over question and answer book. Was decided the question would come up as to why Dean was sitting in on FBI interviews and that the reason was he was conducting an investigation for the President. President asked Dean to write a report. Dean was also critical of Gray.

(March 2 press conference)

March 6, 1973 .

Discussed executive privilege guidelines, decided to cover former White House personnel as well as present.

March 7, 1973

Again discussion executive privilege guidelines. Dean again told the President the White House was clear. The President inquired as to how Pat Gray was doing. Dean informed him E.B. Williams had dropped out of the civil case.

- March 8, 1973 President inquired as to whether Chapin had helped Segretti. Dean said no.
- March 10, 1973 ?
(March 12: Issued statement on executive privilege, applies to present and former staffers but will provide information.)
- March 13, 1973 Preparation for press conference. Went over questions and answers. President inquired as to Ken Rietz. Dean said no illegality involved. President asked if Colson or Haldeman knew Segretti. President asked if Mitchell and Colson knew of Watergate. Dean said there was nothing specific on Colson; that he didn't know about Mitchell but that Strachan could be involved. President states again that Dean should compile a written report about the matter. Dean said Sirica was a hanging judge, the President said he liked hanging judges. They discussed fund raising before April 7. Dean said that everything that had been done was legal.
- March 14, 1973 Press conference was discussed -- questions and answers. Discussed executive privilege. Decided they needed a Supreme Court test. Decided that the President should discuss his 1948 position. That afternoon the President suggested Dean should possibly appear before the press and discussed whether Chapin should make a statement about Segretti. The Gray hearings and the use of FBI files were also discussed.
- March 15, 1973 President held press conference. That afternoon discussed that day's press conference and decided on use of "separation of powers" instead of executive privilege terminology.
- March 16, 1973 The President reiterated his position on use of raw FBI files. Suggested Dean's written report be accompanied by affidavits. Dean suggested untimely release of written report might prejudice rights of innocent people. Discussed possibility of getting

Dash to interview Haldeman and Ehrlichman. The President suggested Dean should possibly go to Camp David to write his report. ✓

March 17, 1973

President had made a note on a press survey containing an article alleging White House involvement for follow-up (Dean possibly has copy of this). Dean again suggested they bring out 1968 bugging and President said Kleindienst had advised against it. Several names were discussed as possibly subject to attack: Colson, Haldeman, Ehrlichman, Mitchell and Dean himself. The President asked Dean point-blank if he knew about the planned break-in in advance. Dean said no, there was no actual White House involvement regardless of appearances except possibly Strachan. Dean told President Magruder pushed Liddy hard but that Haldeman was not involved. The President wanted Haldeman, Ehrlichman and Dean to talk to the Committee and Dean resisted. Dean told the President of the Ellsberg break-in but) that it had nothing to do with Watergate.)

(March 19: Ervin had been on Face the Nation and accused Dean of hiding behind executive privilege.)

March 19, 1973

It was decided Dean would send a letter or sworn statement to the Judiciary Committee answering certain questions.

March 20, 1973

(Republican leadership had been in that day.) Dean discussed Mitchell's problems with the grand jury, Vesco and the Gurney press conference. The President and Moore agreed that the whole investigation should be made public and that a statement should be released immediately after the sentencing of the defendants. Dean suggested that each member of the Ervin Committee be challenged to invite an FBI investigation of his own Senate campaign. The President called Dean that night and Dean said that there was "not a scintilla of evidence" to indicate White House involvement and Dean suggested he give the President a more in-depth briefing on what had transpired.

March 21, 1973

Dean gave the President his theory of what had happened. He still said no prior June 17 White House knowledge, that Magruder probably knew, that Mitchell possibly knew, that Strachan probably knew, that Haldeman had possibly seen the fruits of the wiretaps through Strachan, that Ehrlichman was vulnerable because of his approval of Kalmbach's fund raising efforts. Colson had made the call to Magruder. He stated Hunt was trying to blackmail Ehrlichman about Hunt's prior plumber activities unless he was paid what ultimately might amount to \$1 million. The President said how could it possibly be paid, "What makes you think he would be satisfied with that?", stated it was blackmail, that it was wrong, that it would not work, that the truth would come out anyway. Dean had said that a Cuban group could possibly be used to transfer the payments. Dean said Colson had talked to Hunt about executive clemency. He spoke of Haldeman's return of the \$350,000. He said that Haldeman and Ehrlichman possibly had no legal guilt with regard to the money matters. Dean said nothing of his role with regard to the cover-up money. He said nothing about his discussions with Magruder helping him prepare for the grand jury. He said nothing of his instructions to Caulfield to offer executive clemency.

This information was gone over twice, the last time in Haldeman's presence.

Later that afternoon it was tentatively decided that everyone would go to the grand jury, however, Dean wanted immunity. Haldeman suggested that they write the whole thing out and release it from the White House. Ehrlichman said there should be no executive privilege claim and that no one should ask for immunity. The President told them to discuss these matters with Mitchell.

March 22, 1973

Mitchell suggests they go before the Ervin Committee, that they not use executive privilege but that first it should all be put down on paper .

March 23, 1973

The President called Dean and told him to go to Camp David. Later that afternoon he called Dean at Camp David to check on his progress.

(March 30: After it became obvious Dean would write no report, the President directed Ehrlichman to investigate.)

On April 14 Ehrlichman reported possible Mitchell, Magruder and Dean involvement. The President called Kleindienst, who followed up. (Up until now the President had assumed Dean was getting much of his information from the Justice Department.) Kleindienst and Petersen focused in on possible involvement of Haldeman, Ehrlichman and Strachan.

On April 15 Petersen submitted a memo on Ehrlichman, Haldeman and Strachan. They also found out about Gray's destruction of documents.)

April 15, 1973

Dean along with almost everybody else was called in that day. The President told Dean that he must go before the grand jury without immunity.

April 16, 1973

The President asks Dean to resign. Had two drafts prepared for Dean's signature. Dean demanded Haldeman and Ehrlichman resign also.

(Petersen asked the President to hold off on firing Dean until they could get him before the grand jury.)

On April 17 the President released his statement saying that no White House staffers would receive immunity.

On April 19 Dean said he would not be a scapegoat.

On April 27 Petersen told the President there is no use trying to get Dean to go before the grand jury. that he was demanding immunity.

On April 30 the President made his speech concerning Haldeman's and Ehrlichman's resignations and Dean's firing.)

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FOR IMMEDIATE RELEASE

MAY 22, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

Allegations surrounding the Watergate affair have so escalated that I feel a further statement from the President is required at this time.

A climate of sensationalism has developed in which even second-or third-hand hearsay charges are headlined as fact and repeated as fact.

Important national security operations which themselves had no connection with Watergate have become entangled in the case.

As a result, some national security information has already been made public through court orders, through the subpoenaing of documents and through testimony witnesses have given in judicial and Congressional proceedings. Other sensitive documents are now threatened with disclosure. Continued silence about those operations would compromise rather than protect them, and would also serve to perpetuate a grossly distorted view -- which recent partial disclosures have given -- of the nature and purpose of those operations.

The purpose of this statement is threefold:

-- First, to set forth the facts about my own relationship to the Watergate matter.

-- Second, to place in some perspective some of the more sensational -- and inaccurate -- of the charges that have filled the headlines in recent days, and also some of the matters that are currently being discussed in Senate testimony and elsewhere.

-- Third, to draw the distinction between national security operations and the Watergate case. To put the other matters in perspective, it will be necessary to describe the national security operations first.

In citing these national security matters, it is not my intention to place a national security "cover" on Watergate, but rather to separate them out from Watergate -- and at the same time to explain the context in which certain actions took place that were later misconstrued or misused.

Long before the Watergate break-in, three important national security operations took place which have subsequently become entangled in the Watergate case.

-- The first operation, begun in 1969, was a program of wiretaps. All were legal, under the authorities then existing. They were undertaken to find and stop serious national security leaks.

-- The second operation was a reassessment, which I ordered in 1970, of the adequacy of internal security measures. This resulted in a plan and a directive to strengthen our intelligence operations. They were protested by Mr. Hoover, and as a result of his protest they were not put into effect.

-- The third operation was the establishment, in 1971, of a Special Investigations Unit in the White House. Its primary mission was to plug leaks of vital security information. I also directed this group to prepare an accurate history of certain crucial national security matters which occurred under prior Administrations, on which the Government's records were incomplete.

Here is the background of these three security operations initiated in my Administration.

(MORE)

-2-

1969 Wiretaps.

By mid-1969, my Administration had begun a number of highly sensitive foreign policy initiatives. They were aimed at ending the war in Vietnam, achieving a settlement in the Middle East, limiting nuclear arms, and establishing new relationships among the great powers. These involved highly secret diplomacy. They were closely interrelated. Leaks of secret information about any one could endanger all.

Exactly that happened. News accounts appeared in 1969, which were obviously based on leaks -- some of them extensive and detailed -- by people having access to the most highly classified security materials.

There was no way to carry forward these diplomatic initiatives unless further leaks could be prevented. This required finding the source of the leaks.

In order to do this, a special program of wiretaps was instituted in mid-1969 and terminated in February, 1971. Fewer than 20 taps, of varying duration, were involved. They produced important leads that made it possible to tighten the security of highly sensitive materials. I authorized this entire program. Each individual tap was undertaken in accordance with procedures legal at the time and in accord with long-standing precedent.

The persons who were subject to these wiretaps were determined through coordination among the Director of the FBI, my Assistant for National Security Affairs, and the Attorney General. Those wiretapped were selected on the basis of access to the information leaked, material in security files, and evidence that developed as the inquiry proceeded.

Information thus obtained was made available to senior officials responsible for national security matters in order to curtail further leaks.

The 1970 Intelligence Plan.

In the spring and summer of 1970, another security problem reached critical proportions. In March a wave of bombings and explosions struck college campuses and cities. There were 400 bomb threats in one 24-hour period in New York City. Rioting and violence on college campuses reached a new peak after the Cambodian operation and the tragedies at Kent State and Jackson State. The 1969-70 school year brought nearly 1800 campus demonstrations, and nearly 250 cases of arson on campus. Many colleges closed. Gun battles between guerrilla-style groups and police were taking place. Some of the disruptive activities were receiving foreign support.

Complicating the task of maintaining security was the fact that, in 1966, certain types of undercover FBI operations that had been conducted for many years had been suspended. This also had substantially impaired our ability to collect foreign intelligence information. At the same time, the relationships between the FBI and other intelligence agencies had been deteriorating. By May, 1970, FBI Director Hoover shut off his agency's liaison with the CIA altogether.

On June 5, 1970, I met with the Director of the FBI (Mr. Hoover), the Director of the Central Intelligence Agency (Mr. Richard Helms), the Director of the Defense Intelligence Agency (General Donald V. Bennett) and the Director of the National Security Agency (Admiral Noel Gayler). We discussed the urgent need for better intelligence operations. I appointed Director Hoover as chairman of an interagency committee to prepare recommendations.

(MF)(111)

- 3 -

On June 25, the committee submitted a report which included specific options for expanded intelligence operations, and on July 23 the agencies were notified by memorandum of the options approved. After reconsideration, however, prompted by the opposition of Director Hoover, the agencies were notified five days later, on July 28, that the approval had been rescinded. The options initially approved had included resumption of certain intelligence operations which had been suspended in 1966. These in turn had included authorization for surreptitious entry -- breaking and entering, in effect -- on specified categories of targets in specified situations related to national security.

Because the approval was withdrawn before it had been implemented, the net result was that the plan for expanded intelligence activities never went into effect.

The documents spelling out his 1970 plan are extremely sensitive. They include -- and are based upon -- assessments of certain foreign intelligence capabilities and procedures, which of course must remain secret. It was this unused plan and related documents that John Dean removed from the White House and placed in a safe deposit box, giving the keys to Judge Sirica. The same plan, still unused, is being headlined today.

Coordination among our intelligence agencies continued to fall short of our national security needs. In July, 1970, having earlier discontinued the FBI's liaison with the CIA, Director Hoover ended the FBI's normal liaison with all other agencies except the White House. To help remedy this, an Intelligence Evaluation Committee was created in December, 1970. Its members included representatives of the White House, CIA, FBI, NSA, the Departments of Justice, Treasury, and Defense, and the Secret Service.

The Intelligence Evaluation Committee and its staff were instructed to improve coordination among the intelligence community and to prepare evaluations and estimates of domestic intelligence. I understand that its activities are now under investigation. I did not authorize nor do I have any knowledge of any illegal activity by this Committee. If it went beyond its charter and did engage in any illegal activities, it was totally without my knowledge or authority.

The Special Investigations Unit

On Sunday, June 13, 1971, The New York Times published the first installment of what came to be known as "The Pentagon Papers." Not until a few hours before publication did any responsible Government official know that they had been stolen. Most officials did not know they existed. No senior official of the Government had read them or knew with certainty what they contained.

All the Government knew, at first, was that the papers comprised 47 volumes and some 7,000 pages, which had been taken from the most sensitive files of the Departments of State and Defense and the CIA, covering military and diplomatic moves in a war that was still going on.

Moreover, a majority of the documents published with the first three installments in The Times had not been included in the 47-volume study -- raising serious questions about what and how much else might have been taken.

There was every reason to believe this was a security leak of unprecedented proportions.

(MORE)

-4-

It created a situation in which the ability of the Government to carry on foreign relations even in the best of circumstances could have been severely compromised. Other governments no longer knew whether they could deal with the United States in confidence. Against the background of the delicate negotiations the United States was then involved in on a number of fronts -- with regard to Vietnam, China, the Middle East, nuclear arms limitations, U. S. - Soviet relations, and others -- in which the utmost degree of confidentiality was vital, it posed a threat so grave as to require extraordinary actions.

Therefore during the week following the Pentagon Papers publication, I approved the creation of a Special Investigations Unit within the White House-- which later came to be known as the "plumbers." This was a small group at the White House whose principal purpose was to stop security leaks and to investigate other sensitive security matters. I looked to John Ehrlichman for the supervision of this group.

Egil Krogh, Mr. Ehrlichman's assistant, was put in charge. David Young was added to this unit, as were E. Howard Hunt and G. Gordon Liddy.

The unit operated under extremely tight security rules. Its existence and functions were known only to a very few persons at the White House. These included Messrs. Haldeman, Ehrlichman and Dean.

At about the time the unit was created, Daniel Ellsberg was identified as the person who had given the Pentagon Papers to The New York Times. I told Mr. Krogh that as a matter of first priority, the unit should find out all it could about Mr. Ellsberg's associates and his motives. Because of the extreme gravity of the situation, and not then knowing what additional national secrets Mr. Ellsberg might disclose, I did impress upon Mr. Krogh the vital importance to the national security of his assignment. I did not authorize and had no knowledge of any illegal means to be used to achieve this goal.

However, because of the emphasis I put on the crucial importance of protecting the national security, I can understand how highly motivated individuals could have felt justified in engaging in specific activities that I would have disapproved had they been brought to my attention.

Consequently, as President, I must and do assume responsibility for such actions despite the fact that I, at no time approved or had knowledge of them.

I also assigned the unit a number of other investigatory matters, dealing in part with compiling an accurate record of events related to the Vietnam War, on which the Government's records were inadequate (many previous records having been removed with the change of Administrations) and which bore directly on the negotiations then in progress. Additional assignments included tracing down other national security leaks, including one that seriously compromised the U.S. negotiating position in the SALT talks.

The work of the unit tapered off around the end of 1971. The nature of its work was such that it involved matters that, from a national security standpoint, were highly sensitive then and remain so today.

MORE

- 5 -

These intelligence activities had no connection with the break-in of the Democratic headquarters, or the aftermath.

I considered it my responsibility to see that the Watergate investigation did not impinge adversely upon the national security area. For example, on April 18th, 1973, when I learned that Mr. Hunt, a former member of the Special Investigations Unit at the White House, was to be questioned by the U. S. Attorney, I directed Assistant Attorney General Peterson to pursue every issue involving Watergate but to confine his investigation to Watergate and related matters and to stay out of national security matters. Subsequently, on April 25, 1973, Attorney General Kleindienst informed me that because the Government had clear evidence that Mr. Hunt was involved in the break-in of the office of the psychiatrist who had treated Mr. Ellsberg, he, the Attorney General, believed that despite the fact that no evidence had been obtained from Hunt's acts, a report should nevertheless be made to the court trying the Ellsberg case. I concurred, and directed that the information be transmitted to Judge Byrne immediately.

Watergate

The burglary and bugging of the Democratic National Committee headquarters came as a complete surprise to me. I had no inkling that any such illegal activities had been planned by persons associated with my campaign; if I had known, I would not have permitted it. My immediate reaction was that those guilty should be brought to justice and, with the five burglars themselves already in custody, I assumed that they would be.

Within a few days, however, I was advised that there was a possibility of CIA involvement in some way.

It did seem to me possible that, because of the involvement of former CIA personnel, and because of some of their apparent associations, the investigation could lead to the uncovering of covert CIA operations totally unrelated to the Watergate break-in.

In addition, by this time, the name of Mr. Hunt had surfaced in connection with Watergate, and I was alerted to the fact that he had previously been a member of the Special Investigations Unit in the White House. Therefore, I was also concerned that the Watergate investigation might well lead to an inquiry into the activities of the Special Investigations Unit itself.

In this area, I felt it was important to avoid disclosure of the details of the national security matters with which the group was concerned. I knew that once the existence of the group became known, it would lead inexorably to a discussion of these matters, some of which remain, even today, highly sensitive.

I wanted justice done with regard to Watergate; but in the scale of national priorities with which I had to deal -- and not at that time having any idea of the extent of political abuse which Watergate reflected -- I also had to be deeply concerned with ensuring that neither the covert operations of the CIA nor the operations of the Special Investigations Unit should be compromised. Therefore, I instructed Mr. Haldeman and Mr. Ehrlichman to ensure that the investigation of the break-in not expose either an unrelated covert operation of the CIA or the activities of the White House investigations unit -- and to see that this was personally coordinated between General Walters, the Deputy Director of the CIA, and Mr. Gray of the FBI. It was certainly not my intent, nor my wish, that the investigation of the Watergate break-in or of related acts be impeded in any way.

(MORE)

-6-

On July 6, 1972, I telephoned the Acting Director of the FBI, L. Patrick Gray, to congratulate him on his successful handling of the hijacking of a Pacific Southwest Airlines plane the previous day. During the conversation Mr. Gray discussed with me the progress of the Watergate investigation, and I asked him whether he had talked with General Walters. Mr. Gray said that he had, and that General Walters had assured him that the CIA was not involved. In the discussion, Mr. Gray suggested that the matter of Watergate might lead higher. I told him to press ahead with his investigation.

It now seems that later, through whatever complex of individual motives and possible misunderstandings, there were apparently wide-ranging efforts to limit the investigation or to conceal the possible involvement of members of the Administration and the campaign committee.

I was not aware of any such efforts at the time. Neither, until after I began my own investigation, was I aware of any fund raising for defendants convicted of the break-in at Democratic headquarters, much less authorize any such fund raising. Nor did I authorize any offer of Executive clemency for any of the defendants.

In the weeks and months that followed Watergate, I asked for, and received, repeated assurances that Mr. Dean's own investigation (which included reviewing files and sitting in on FBI interviews with White House personnel) had cleared everyone then employed by the White House of involvement.

In summary, then:

- (1) I had no prior knowledge of the Watergate bugging operation, or of any illegal surveillance activities for political purposes.
- (2) Long prior to the 1972 campaign, I did set in motion certain internal security measures, including legal wiretaps, which I felt were necessary from a national security standpoint and, in the climate then prevailing, also necessary from a domestic security standpoint.
- (3) People who had been involved in the national security operations later, without my knowledge or approval, undertook illegal activities in the political campaign of 1972.
- (4) Elements of the early post-Watergate reports led me to suspect, incorrectly, that the CIA had been in some way involved. They also led me to surmise, correctly, that since persons originally recruited for covert national security activities had participated in Watergate, an unrestricted investigation of Watergate might lead to and expose those covert national security operations.
- (5) I sought to prevent the exposure of these covert national security activities, while encouraging those conducting the investigation to pursue their inquiry into the Watergate itself. I so instructed my staff, the Attorney General and the Acting Director of the FBI.
- (6) I also specifically instructed Mr. Haldeman and Mr. Ehrlichman to ensure that the FBI would not carry its investigation into areas that might compromise these covert national security activities, or those of the CIA.
- (7) At no time did I authorize or know about any offer of Executive clemency for the Watergate defendants. Neither did I know until the time of my own investigation, of any efforts to provide them with funds.

(MORE)

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Conclusion

With hindsight, it is apparent that I should have given more heed to the warning signals I received along the way about a Watergate cover-up and less to the reassurances.

With hindsight, several other things also become clear:

-- With respect to campaign practices, and also with respect to campaign finances, it should now be obvious that no campaign in history has ever been subjected to the kind of intensive and searching inquiry that has been focused on the campaign waged in my behalf in 1972.

It is clear that unethical, as well as illegal, activities took place in the course of that campaign.

None of these took place with my specific approval or knowledge. To the extent that I may in any way have contributed to the climate in which they took place, I did not intend to; to the extent that I failed to prevent them, I should have been more vigilant.

It was to help ensure against any repetition of this in the future that last week I proposed the establishment of a top-level, bipartisan, independent commission to recommend a comprehensive reform of campaign laws and practices. Given the priority I believe it deserves, such reform should be possible before the next Congressional elections in 1974.

-- It now appears that there were persons who may have gone beyond my directives, and sought to expand on my efforts to protect the national security operations in order to cover up any involvement they or certain others might have had in Watergate. The extent to which this is true, and who may have participated and to what degree, are questions that it would not be proper to address here. The proper forum for settling these matters is in the courts.

-- To the extent that I have been able to determine what probably happened in the tangled course of this affair, on the basis of my own recollections and of the conflicting accounts and evidence that I have seen, it would appear that one factor at work was that at critical points various people, each with his own perspective and his own responsibilities, saw the same situation with different eyes and heard the same words with different ears. What might have seemed insignificant to one seemed significant to another; what one saw in terms of public responsibility, another saw in terms of political opportunity; and mixed through it all, I am sure, was a concern on the part of many that the Watergate scandal should not be allowed to get in the way of what the Administration sought to achieve.

The truth about Watergate should be brought out -- in an orderly way, recognizing that the safeguards of judicial procedure are designed to find the truth, not to hide the truth.

With his selection of Archibald Cox -- who served both President Kennedy and President Johnson as Solicitor General -- as the special supervisory prosecutor for matters related to the case, Attorney General-designate Richardson has demonstrated his own determination to see the truth brought out. In this effort he has my full support.

Considering the number of persons involved in this case whose testimony might be subject to a claim of Executive privilege, I recognize that a clear definition of that claim has become central to the effort to arrive at the truth.

(MORE)

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Accordingly, Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up.

I want to emphasize that this statement is limited to my own recollections of what I said and did relating to security and to the Watergate. I have specifically avoided any attempt to explain what other parties may have said and done. My own information on those other matters is fragmentary, and to some extent contradictory. Additional information may be forthcoming of which I am unaware. It is also my understanding that the information which has been conveyed to me has also become available to those prosecuting these matters. Under such circumstances, it would be prejudicial and unfair of me to render my opinions on the activities of others; those judgments must be left to the judicial process, our best hope for achieving the just result that we all seek.

As more information is developed, I have no doubt that more questions will be raised. To the extent that I am able, I shall also seek to set forth the facts as known to me with respect to those questions.

#

THE WHITE HOUSE
WASHINGTON

June 19, 1973

Dear Mr. Dean:

I am authorized by the President to inform you that the President will not invoke executive privilege, and you are released from any attorney-client privilege with regard to testimony you may give concerning the Watergate break-in, efforts to cover it up, or any other matters relevant to the inquiry of the Senate Select Committee.

Insofar as you may have information that is related to national security, it is for your counsel to advise you what lawfully may be disclosed. The President is not authorizing any release of legally protected national security material.

I advised the Senate Select Committee of this yesterday, and I am writing you so that you may have direct information about this.

Sincerely,



Leonard Garment
Counsel to the President

Mr. John W. Dean III
100 Quay Street
Alexandria, Virginia 22314

cc: Mr. Samuel Dash, Senate Select Committee
Mr. Fred Thompson, Senate Select Committee

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, et al.,)
Plaintiffs)
v.) Civil Action
RICHARD M. NIXON,) No. 1593-73
individually and as President of the United)
States,)
Defendant)

AMENDMENT TO COMPLAINT

The Complaint herein, filed on August 9, 1973, is hereby amended, with leave of Court^{*} and without objection of defendant, as follows:

1. On page 4 of the Complaint, immediately preceding paragraph 10, the following paragraph is inserted:

"9a. The jurisdiction of this Court further rests on Public Law 93-190, codified as 18 U.S.C. § 1364, which became law on December 19, 1973, and which grants this Court 'original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities . . . to enforce or secure a declaration concerning the validity of any subpoena . . . heretofore or hereafter issued by said Committee to the President . . . to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said

* Sirica, C. J.

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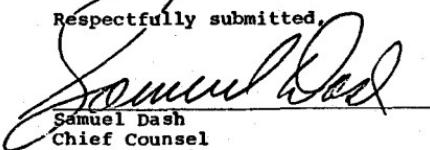
-2-

Committee is authorized to investigate, and
[this] Committee shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order.' This statute also establishes the Select Committee's authority to sue in its own name and in the name of the United States and to prosecute this action by the attorneys of its choice. A copy of P.L. 93-190 is appended hereto and made a part of this complaint by reference.

2. On page 7 of the Complaint, immediately preceding the heading "Cause of Action," the following paragraph is inserted:

"18a. On November 7, 1973, the Senate passed Senate Resolution 194, 93d Cong. 1st Sess., which approved and ratified the Committee's actions in subpoenaing and suing the President and stated that it is the sense of the Senate that the Committee, in so doing, was and is acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions. A copy of S.Res 194 is appended hereto and made a part of this complaint by reference."

Respectfully submitted,



Samuel Dash
Chief Counsel

Fred D. Thompson
Minority Counsel

Rufus Edmisten
Deputy Counsel

James Hamilton
Assistant Chief Counsel

-3-

**Richard B. Stewart
Special Counsel**

**Ronald D. Rotunda
Assistant Counsel**

**Sherman Cohn
Eugene Gressman
Jerome A. Barron
Washington, D. C.
Of Counsel**

**Donald S. Burris
Assistant Counsel**

**William T. Mayton
Assistant Counsel**

**Arthur S. Miller
Chief Consultant to
the Select Committee
Of Counsel**

**United States Senate
Washington, D. C. 20510
Telephone Number 225-0531**

Attorneys for Plaintiffs

January 7, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, suing in its own)
name and in the name of the UNITED)
STATES,)
and)
SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;)
HERMAN E. TALMADGE; DANIEL K. INOUYE;)
JOSEPH M. MONTOYA; EDWARD J. GURNEY;) Civil Action No. 1593-73
and LOWELL P. WEICKER, JR., as United)
States Senators who are members of)
the Senate Select Committee on)
Presidential Campaign Activities)
Plaintiffs)
v.)
RICHARD M. NIXON, individually and as)
President of the United States)
Defendant)

ANSWER

Richard M. Nixon, answering the complaint filed in
above-styled cause, states as follows:

1. Admits the truth of the allegations contained in paragraph one of the complaint, but denies that plaintiffs acted within their authority in issuing the subpoenas duces tecum to the President of the United States and thereafter in instituting this action.
2. Denies the truth of the allegation contained in paragraph two of the complaint.
3. Admits the truth of the allegations contained in paragraph three of the complaint, but denies that plaintiffs are entitled to investigate criminal conduct; and further denies that plaintiffs are empowered to bring suit against the President of the United States.

4. Admits the truth of the allegations contained in paragraph four of the complaint, but denies that the members of the Senate Select Committee are empowered to bring suit in their official capacities as members of that Committee.

5. Admits the truth of the allegations contained in paragraph five of the complaint, but denies that the President of the United States can be sued in his official capacity; and further denies that he can be sued individually for acts performed in his official capacity.

6. Denies the truth of the allegations contained in paragraphs six through ten of the complaint.

7. Admits the truth of the allegations contained in paragraph eleven, but denies that plaintiffs are empowered to subpoena materials from the President of the United States.

8. Admits the truth of the allegations contained in paragraphs twelve through fifteen of the complaint.

9. Admits the truth of the allegation contained in paragraph sixteen of the complaint, but denies that any court has jurisdiction to quash, modify, or narrow a subpoena issued by a Committee of Congress.

10. Admits the truth of the allegations contained in paragraph seventeen of the complaint.

11. Alleges that he is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph eighteen of the complaint, and denies that he has conceded the relevancy of any "tapes" to plaintiffs' investigation.

12. Denies the truth of the allegations contained in paragraphs nineteen through twenty-five of the complaint.

In further defense to the complaint, Richard M. Nixon states as follows:

First Defense

That the complaint fails to state a claim upon which relief can be granted.

Second Defense

That this Court lacks jurisdiction over the person of Richard M. Nixon in this action, either individually or as President of the United States.

Third Defense

That this Court lacks jurisdiction over the subject matter of this action because:

(a) the matter in controversy does not exceed the sum or value of ten thousand dollars, exclusive of interest and costs, as required by 28 U.S.C. 1331;

(b) this is not an action commenced on behalf of the United States within the meaning of 28 U.S.C. 1345, because plaintiffs are not expressly authorized to sue on behalf of the United States by an Act of Congress; Senate Resolution 262, 70th Cong., 1st Sess. (1928) is not sufficient authorization to sue;

(c) Richard M. Nixon owes no duty, either individually or as President of the United States, to the plaintiffs that affords mandamus jurisdiction within the meaning of 28 U.S.C. 1361; and

(d) this matter is not reviewable under 5 U.S.C. 701-706 or any relevant statute because the plaintiffs have not suffered any legal wrong nor have they been adversely affected or aggrieved as the result of any agency action.

Fourth Defense

That this action presents no justiciable controversy as required by Article III of the United States Constitution, and 28 U.S.C. 2201 and 2202.

Fifth Defense

That plaintiffs lack standing to bring this action.

Sixth Defense

That Senate Resolution 60, 93rd Cong., 1st Sess. (1973), purports to authorize an investigation of alleged criminal conduct, and that upon information and belief the investigation by plaintiffs has been, in fact, a criminal investigation and trial conducted for the purpose of determining whether or not criminal acts have been committed and the guilt or innocence of individuals, which Resolution and investigation exceed the legislative powers granted to the Congress in Article I of the Constitution.

Seventh Defense

That the subpoenas upon which this action is predicated are null and void in that the Senate has not authorized the issuance of a subpoena to the President of the United States.

Eighth Defense

That plaintiffs have failed, as required by Senate Resolution 60, Sec. 3(a)(6), 93rd Cong., 1st Sess. (1973) to refer the President's action to the United States Senate for appropriate review and action.

Ninth Defense

That the subpoena duces tecum attached as Exhibit D to the complaint is so unreasonably broad and oppressive as to make compliance impossible.

Tenth Defense

That the relief sought by plaintiffs constitutes an unconstitutional attempt to interfere with the confidentiality of private records of conversations between the President of the United States and his closest advisers relating to the official duties of the President.

WHEREFORE, premises considered, the relief prayed for should be denied.

Respectfully submitted,

LEONARD GARMENT
J. FRED BUZHARDT
CHARLES ALAN WRIGHT
DOUGLAS M. PARKER
ROBERT T. ANDREWS
THOMAS P. MARINIS, JR.
RICHARD A. HAUSER

Attorneys for the President

The White House
Washington, D.C. 20500
Telephone Number: 456-1414

BY:



CERTIFICATE OF SERVICE

I, J. Fred Buzhardt, hereby certify that on this
29th day of August, 1973, I have served the foregoing
Answer on counsel for the plaintiffs by causing copies
thereof to be hand-delivered to the office of

Samuel Dash
Chief Counsel
Senate Select Committee on
Presidential Campaign
Activities
United States Senate
Washington, D.C. 20510

J. Fred Buzhardt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, suing in its own)
name and in the name of the UNITED)
STATES,)
)
and)
)
SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;)
HERMAN E. TALMADGE; DANIEL K. INOUE;)
JOSEPH M. MONTOYA; EDWARD J. GURNEY;) Civil Action No. 1593-
and LOWELL P. WEICKER, JR., as United)
States Senators who are members of)
the Senate Select Committee on)
Presidential Campaign Activities)
)
)
Plaintiffs)
v.)
RICHARD M. NIXON, individually and as)
President of the United States)
)
Defendant)

AMENDED ANSWER

Richard M. Nixon, answering the amended complaint filed
in the above-styled cause, states as follows:

1. Admits the allegations contained in paragraph one of the
complaint, but denies that plaintiffs acted within their authority
in issuing the subpoenas duces tecum to the President of the
United States and thereafter in instituting this action.
2. Denies the allegation contained in paragraph two of
the complaint.
3. Admits the allegations contained in paragraph three
of the complaint, but denies that plaintiffs are entitled to
investigate criminal conduct; and further denies that plaintiffs
are empowered to bring suit against the President of the
United States.

4. Admits the allegations contained in paragraph four of the complaint.

5. Admits the allegations contained in paragraph five of the complaint, but denies that the President of the United States can be sued in his official capacity; and further denies that he can be sued individually for acts performed in his official capacity.

6. Denies the allegations contained in paragraphs six through nine of the complaint.

7. Admits the allegations contained in paragraph nine "a" that Public Law 39-190 ostensibly confers jurisdiction upon this court but denies that the subject matter is justiciable.

8. Denies the allegations contained in paragraph ten of the complaint.

9. Admits the allegations contained in paragraph eleven, but denies that plaintiffs are empowered to subpoena materials from the President of the United States.

10. Admits the allegations contained in paragraphs twelve through fifteen of the complaint.

11. Admits the allegation contained in paragraph sixteen of the complaint, but denies that any court has jurisdiction to quash, modify, or narrow a subpoena issued by a Committee of Congress.

12. Admits the allegations contained in paragraph seventeen of the complaint.

13. Alleges that he is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph eighteen of the complaint, and denies that he has conceded the relevancy of any "tapes" to plaintiffs' investigation.

14. Admits the allegations contained in paragraph eighteen "a" of the complaint.

15. Denies the allegations contained in paragraphs nineteen through twenty-five of the complaint.

In further defense to the complaint, Richard M. Nixon states as follows:

First Defense

That the complaint fails to state a claim upon which relief can be granted.

Second Defense

That this Court lacks jurisdiction over the person of Richard M. Nixon in this action, either individually or as President of the United States.

Third Defense

That this action presents no justiciable controversy as required by Article III of the United States Constitution, and 28 U.S.C. 2201 and 2202.

Fourth Defense

That Senate Resolution 60, 93rd Cong., 1st Sess. (1973), purports to authorize an investigation of alleged criminal conduct, and that upon information and belief the investigation by plaintiffs has been, in fact, a criminal investigation and trial conducted for the purpose of determining whether or not criminal acts have been committed and the guilt or innocence of individuals, which Resolution and investigation exceed the legislative powers granted to the Congress in Article I of the Constitution.

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That the subpoena duces tecum attached as Exhibit D to the complaint is so unreasonably broad and oppressive as to make compliance impossible.

Sixth Defense

That the relief sought by plaintiffs constitutes an unconstitutional attempt to interfere with the confidentiality of private records of conversations between the President of the United States and his closest advisers relating to the official duties of the President.

Seventh Defense

That it is both common knowledge in the community and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and thus may be judicially noticed by this Court, that the Senate Select Committee served three additional subpoenas, sixty-eight pages in length and returnable January 4, 1974, calling on the President to produce hundreds of tapes and documents. When considered in conjunction with the subpoenas which are the subject of the instant litigation, it is clear that such a massive invasion of the White House constitutes "wholesale public access to Executive deliberations and documents" tending to "cripple the Executive as a co-equal branch."

WHEREFORE, premises considered, the relief prayed for should be denied.

Respectfully submitted,

J. FRED BUZHARDT
JAMES D. ST. CLAIR
CHARLES ALAN WRIGHT
ROBERT T. ANDREWS
THOMAS P. MARINIS, JR.

Attorneys for the President

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By: _____

Of Counsel

RICHARD A HAUSER
K. GREGORY HAYNES
GEORGE P. WILLIAMS

(b) received 1/24/73 J-15
PAGE 108

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED	AUG 9 1973
JAMES F. DAVEY CLERK	

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

Civil Action
No. 1593-73

v.

RICHARD M. NIXON, individually and as
President of the United States

Defendant

MOTION FOR SUMMARY JUDGMENT

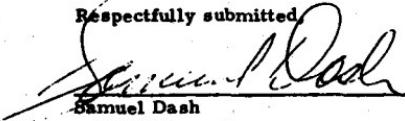
Plaintiffs, by their undersigned attorneys, hereby move the Court, pursuant to Rule 56, F. R. Civ. P., and 28 U.S.C. §2201 to grant them summary judgment in this cause and to adjudge and declare that:

(1) The two subpoenas duces tecum issued to and served upon the defendant President by plaintiff Select Committee on Presidential Campaign Activities were lawfully issued and served and must therefore be complied with by defendant President.

(2) The defendant President's refusal and failure to comply with said subpoenas were unlawful and cannot be justified by resort to any asserted Presidential power, prerogative or privilege, or otherwise.

The grounds for this motion are more fully set forth in the accompanying Memorandum In Support Of Motion For Summary Judgment and Statement Of Material Facts As To Which There Is No Genuine Issue.

Respectfully submitted,



Samuel Dash

Chief Counsel

Fred D. Thompson

Minority Counsel

Rufus Edmisten

Deputy Counsel

James Hamilton

Assistant Chief Counsel

Richard B. Stewart

Special Counsel

Ronald D. Rotunda

Assistant Counsel

United States Senate

Washington, D.C. 20510

Tel. No. 225-0531

Attorneys for Plaintiffs

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Eugene Gressman
Jerome A. Barron
Washington, D.C.
Of Counsel

Arthur S. Miller
Chief Consultant to
the Select Committee
Washington, D.C.
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIASENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, et al.,Plaintiffs

v.

Civil Action
No. 1593-73RICHARD M. NIXON, individually and as
President of the United States,DefendantSTATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE
ISSUE

1. The Senate Select Committee on Presidential Campaign Activities is a duly authorized and constituted committee of the Senate of the United States. It was created by Senate Resolution 60, 93rd Congress, 1st Session (1973), which was enacted by a unanimous vote of the Senate on February 7, 1973. (A copy of S. Res. 60 is attached to the complaint herein as Exhibit A.) Under S. Res. 60 the Select Committee is empowered to investigate and study "illegal, improper or unethical activities" in connection with the Presidential campaign and election of 1972 and to determine the necessity of new legislation "to safeguard the electoral process by which the President of the United States is chosen." The Select Committee is further authorized by a standing order of the Senate, Senate Resolution 262, 70th Congress, 1st Session (May 28, 1928), attached to the complaint as Exhibit B, "to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed on it by the Constitution, resolution of the Senate, or other law."

-2-

2. The duly designated members of the Select Committee are Senator Sam J. Ervin, Jr., of North Carolina (Chairman); Senator Howard H. Baker, Jr., of Tennessee (Vice-Chairman); Senator Herman E. Talmadge of Georgia; Senator Daniel K. Inouye of Hawaii; Senator Joseph M. Montoya of New Mexico; Senator Edward J. Gurney of Florida; and Senator Lowell P. Weicker, Jr., of Connecticut.

3. Section 3 (a) (5) of S. Res. 60, empowers the Select Committee

". . . to require by subpena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any private person, firm, or corporation, or any officer or former officer or employee of any political committee or organization to produce for its consideration or for use as evidence in its investigation and study any books, checks, canceled checks, correspondence, communications, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control; . . ."

4. On July 16, 1973, Alexander P. Butterfield, former Deputy Assistant to defendant Richard M. Nixon, President of the United States, testified that certain Presidential conversations, both face-to-face and telephonic, had been recorded by electronic means and are preserved on tapes. See, e.g., Select Committee Transcript, pp. 4144-52 (hereinafter cited as S. Tr.). The accuracy of Mr. Butterfield's testimony was later confirmed in all pertinent parts by a letter to Chairman Ervin from J. Fred Buzhardt, Counsel to the President, dated July 16, 1973. S. Tr. #184.

5. On July 23, 1973, after informal attempts by the Select Committee to obtain certain tapes and other documents and materials relating to the Presidential campaign and election

-3-

of 1972 had failed, the Committee addressed two subpenas duces tecum, signed by its Chairman, to "President Richard M. Nixon, The White House, Washington, D. C.," which sought the tape recordings of specified conversations and other designated materials. Both subpenas were duly served on July 23, 1973. The two subpenas, with their proof of service, are attached to the complaint as Exhibits C and D.

6. All tapes and materials subpoenaed by the Select Committee are, and were at the time the subpena was issued, under the sole possession, custody and control of the defendant President. However, until around the time of the revelation on July 16, 1973, of the existence of the tapes by Mr. Butterfield, the subpoenaed tapes, were under the immediate possession, custody and control of the Chief of the Technical Security Division of the Secret Service. S. Tr. 4166, 4182-84.

7. Both the aforesaid subpenas were returnable on July 26, 1973, at 10 a.m. at the Caucus Room (Room 318), Old Senate Office Building. Neither on that date nor on any other date has the defendant President complied with the subpenas or otherwise made available to the Select Committee the materials sought by the subpenas. The defendant President's refusal to comply with the subpenas was announced in a letter of July 25, 1973, which was addressed to Chairman Ervin and received by him on July 26, 1973. (This letter is appended to the complaint as Exhibit E.) In justification of his refusal to comply with the subpenas, the defendant President relied in part on reasons stated in letters from him to Chairman Ervin dated July 6 and July 23, 1973 (which are appended to the complaint as Exhibits F and G).

8. The defendant President has not moved in this Court or any other Court to quash, modify or narrow the scope of either subpoena.

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o. Seven individuals -- G. Gordon Liddy, E. Howard Hunt, James W. McCord, Bernard L. Barker, Frank A. Sturgis, Virgilio R. Gonzales and Eugenio R. Martinez -- have been indicted and convicted, by plea or verdict, for their complicity in the break-in of the Democratic National Committee Headquarters at the Watergate on June 17, 1973. The eight-count indictment in their case charged these seven individuals with the crimes of conspiracy to commit an offense and to defraud the United States (18 U.S.C. § 371), second degree burglary (22 D.C. Code § 1801 (b)), illegal interception of wire communications and attempted illegal interception of wire and oral communications (18 U.S.C. § 2511), and illegal possession of intercepting devices (23 D.C. Code § 543 (a)). Two other individuals, Jeb Stuart Magruder and Frederick LaRue, both high officials in the Committee to Re-elect the President, have pleaded guilty to criminal informations in lieu of indictment charging them with a conspiracy to commit an offense or to defraud the United States. The acts listed by one or both of these two informations as part of such conspiracy include the preparation and presentation of false testimony to the Federal Bureau of Investigation, the Grand Jury and at trial, the payment of cash funds to the seven defendants to ensure their silence, the destruction of incriminating records and the misrepresentation that the Central Intelligence Agency had an interest in limiting the criminal investigation. John Wesley Dean III, and Herbert Lloyd Porter have also admitted their participation in a conspiracy to cover up the true facts of the Watergate episode. E.g., S. Tr. 1483-85, 2400, 2432, 2463, Testimony before the Select Committee, if believed, would tend to implicate yet other important former governmental and Committee to Re-elect the President officials in a conspiracy to obstruct justice and other illegal conduct, including, e.g., John D. Ehrlichman,

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H. R. Haldeman, John N. Mitchell, Robert C. Mardian, and Herbert W. Kalmbach. See, e.g., S. Tr. 1899-1901, 1907, 1913-14, 2063-64, 2171-73, 2183, 2196, 2199-2200, 2211-16, 2253, 2259, 2260-65, 2267-71, 2272-73, 2299-2300, 3174-78, 3578-79, 4992, 5018-20, 5031-34. In fact, there is evidence that, if believed, would tend to implicate the defendant President in criminal conduct. See, e.g., Paras. 11-15 below and S. Tr. 2621, 2352-53, 2397, 4783-84, 5147-48. There is also testimony that would exonerate the President and others who have been accused. S. Tr. 3287, 3301-03, 3307-08, 3355-58, 3375-79, 3416-17, 3322-23, 3332-33, 3342, 3435-40, 3799, 3803, 5419-37, 5465, 5716, 5721-22, 5784, 6037-6130.

10. The subpoena appended to the complaint as Exhibit C directed the defendant President to make available to the Select Committee certain specified electronic tapes that recorded five personal conversations "between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972." Emphasis added The five conversations occurred on September 15, 1972; February 28, 1973; March 13, 1973; and March 21, 1973, there being two conversations on the last mentioned date. The various accounts of the pertinent portions of these conversations are summarized in Paras. 11-15 below.

11. On September 15, 1972, the President met with John Dean and H. R. Haldeman from 4:27 p.m. to 6:17 p.m. This meeting took place shortly after the indictments of the seven original defendants had been issued. Different versions of this meeting have emerged.

(a) The Dean version: When Dean entered the Oval Office he found the President and Haldeman "in very good spirits and his reception was very warm and cordial."

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The President said that "Bob . . . had kept him posted on Dean's handling of the Watergate case." The President remarked that Dean "had done a good job" and that he "was pleased the case had stopped with Liddy." Dean said that while he "had been able to contain the case and assist in keeping it out of the White House," he "could make no assurances that the day would not come when this matter would start to unravel." Dean told the President that Committee to Re-elect the President lawyers in the civil suit "had been making ex parte contacts with the judge handling the case and that the judge was very understanding and trying to accomodate their problems," which "pleased" the President and caused him to state, "Well, that's helpful." Dean testified that, after the meeting, he had a "conviction" that the President was aware of the details of the cover-up. See, e.g., Exhibit H to the complaint, S. Tr. 2229-33, 3166.

(b) The Haldeman version(prepared after he heard the tape of this meeting): "The President knew John Dean had been concentrating for a three-month period on the investigation for the White House and I am sure therefore that the President thought it would be a good time to give Dean a pat on the back." "There was no mood of exuberance" but "it was good news . . . there was not any involvement by anyone in the White House. This confirmed what Mr. Dean had been telling us, and we had been reporting to the President over the period of the past three months." The President did not say, "Bob had kept me posted on your handling of the Watergate" or anything remotely resembling that;"but instead said, "Hi, this was quite a day, you've got Watergate on the way" or something to that effect"

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and later did "commend Dean for his handling of the whole Watergate matter." Dean said "it had been quite a three months." While there was "some discussion about Judge Richey hearing the civil case and a comment that he would keep Roemer McPhee abreast of what was happening," Haldeman recalled no "comment about the judge trying to slow down the suit." Dean indicated "there was apparently no information that would be harmful that had not been uncovered already." Haldeman disagrees "with the conclusion that the President was aware of any type of cover-up" and states that "certainly Mr. Dean did not advise him of it at the September 15th meeting." See, e.g., Exhibit H to the Complaint and S. Tr. 6090-93.

(c) The White House versions: J. Fred Buzhardt, Special Counsel to the President, in his oral briefing to Fred Thompson, Select Committee Minority Counsel on the contents of the Dean Presidential conversations (see Para. 23, infra. and Exhibit J to the complaint) stated only that Dean reported on the Watergate indictments. The defendant President, in his August 22, 1973, San Clemente news conference, stated that Dean, on September 15th, declared that "there was not . . . 'a scintilla of evidence' indicating that anyone on the White House staff was involved in the planning of the Watergate break-in."

(Emphasis added) See Washington Post, August 23rd, pp. A10-12.

12. The February 28, 1973, meeting was between Dean and the defendant President alone and lasted from 9:12 a.m. to 10:23 a.m.

(a) Dean version: Dean told the President that he (Dean) "was also involved in the post-June 17th activities regarding Watergate" and described to him why he "had legal problems," i.e., he "had been a conduit for many

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of the decisions that were made and, therefore, could be involved in an obstruction of justice." The President "would not accept his analysis" and told him he (Dean) "had no legal problems." See, e.g., Exhibit I to the complaint, S. Tr. 2317.

(b) White House versions: According to Buzhardt, Dean said there was no White House involvement in Watergate, that Maurice Stans was a victim of circumstances and that Charles Colson was a lightning rod because of his reputation. See Exhibit I to the complaint. The President, in his August 22nd news conference, did not specially deal with this meeting but did say that Dean, from September 1972 through March 1973 assured him that no one in the White House was involved in the "planning" of the Watergate break-in. Washington Post, August 23, 1973, p. A11.

13. On March 13, 1973, the defendant President met with Dean from 12:02 p.m. to 2 p.m. Mr. Haldeman was present from 12:43 p.m. to 12:55 p.m.

(a) Dean version: Dean told the President about the "money demands being made by the seven convicted defendants . . ." After Haldeman came in, Dean told the President "that there was no money to pay these individuals to meet their demands. He asked how . . . much it would cost." Dean estimated "as high as a million dollars or more" and the President said "that was no problem." Dean said the principal money demands came from Hunt. The President then said "Hunt had been promised Executive clemency," that "he had discussed this matter with Ehrlichman" and that, to his annoyance, "Colson had also discussed it with him later." The President asked Dean how the money was being paid to the defendants. Dean said, "The money was

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laundered so it could not be traced and then there were secret deliveries." See, e.g., Exhibit H to the complaint; S.Tr. 2323-25.

(b) Haldeman has no recollection of the events of the March 13th meeting. See Exhibit H to the complaint; S. Tr. 6100.

(c) White House versions: Mr. Buzhardt's reconstruction of this meeting omits all the Dean account presented above. According to Buzhardt, the President asked if Mitchell and Colson knew of Watergate (presumably beforehand) and Dean replied that there was nothing specific on Colson, he didn't know about Mitchell but Gordon Strachan could be involved. However, the defendant President, in his August 22nd news conference, stated that Dean had assured him from September 1972 through March 1973 that there had been absolutely no White House involvement in the "planning" of Watergate. Washington Post, August 23, 1973, p. A11.

14. Dean met with the President on the morning of March 21, 1972, from 10:12 a.m. to 11:55 a.m. The White House log of Dean Presidential meetings states that "Mr. Haldeman was also present for at least part of the time." See Exhibit I to the complaint.

(a) Dean's version: Dean's purpose in this meeting was to give the President "a full report of all the facts that he knew and explain to him what he believed to be the implication of those facts." He began by saying "there was a cancer growing in the Presidency" and that, if it were not removed, "the President himself would be killed by it." Dean discussed the planning of the Watergate affair and its implementation. He discussed the January and February planning meetings, and mentioned he had informed Haldeman of them and received instructions

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from him to have nothing to do with the project. He said that Colson had put some pre-Watergate pressure on Magruder relating to the operation, but that he did not have the facts as to the degree of pressure. He said he was not sure if Mitchell had prior knowledge of the break-in, but had been told that both Mitchell and Haldeman (through Strachan) had received wiretap information. Dean then recounted "the highlights of the cover-up." He said that he, Ehrlichman, Haldeman, Mitchell and Kalmbach had been involved in raising and paying money to the defendants to achieve their silence. He said that money demands from the defendants, especially Hunt, were increasing and that Hunt was threatening to reveal the "seamy things . . . he had done for the White House," if his requirements were not met. Dean told the President that Magruder had committed perjury before the Grand Jury with Dean's assistance. He stated that more money and more perjury would be required "to perpetuate the cover-up." It was not until Dean had made this presentation that Haldeman came into the President's office. See, e.g., Exhibit H to the complaint; S. Tr. 2329-2334.

(b) Haldeman version (after hearing tape of conversation): Dean said no White House personnel were involved in planning of the break-in; Magruder was aware of the operation but he was not sure about Mitchell's knowledge. Dean was concerned that Colson's call to Magruder showed White House pressure and that Haldeman through Strachan had received the "fruits" of the operation. Dean said he made a report to Haldeman after the second planning meeting. "Regarding the post-June 17th situation, he indicated concern about two problems, money and clemency." He said Colson had spoken to Hunt regarding clemency. The President said,

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and Dean agreed, that the President could not offer clemency. Dean said he, Kalmbach and Haldeman were involved in money matters, and gave details of their involvement. He reported on Hunt's current "blackmail threat" that unless he received \$120,000 he would reveal the "seamy things" he had done for Ehrlichman." Dean said a million dollars eventually would be needed. "The President said, 'There is no problem in raising a million dollars, we can do that, but it would be wrong!'" The President inquired as to how this money could be paid and Dean discussed laundering procedures. Haldeman believes Dean is confusing the meetings of the 13th and the 21st because there is a similarity between Dean's version of the meeting on the 13th and Haldeman's view regarding the events of the 21st. See, e.g., Exhibit H to the complaint; S. Tr. 6112-15.

(c) Buzhardt version: Dean at first said there was no White House knowledge of Watergate prior to June 17, 1972, but then stated that Strachan probably knew and that possibly Haldeman, through Strachan, had seen the "fruits" of the wiretaps. He said Magruder probably, and Mitchell possibly, had prior knowledge. Also, Colson had made a call to Magruder relating to the operation. Ehrlichman was vulnerable because of his approval of Kalmbach's fund-raising efforts. Hunt was trying to blackmail Ehrlichman and might ultimately have to be paid a million dollars. The President stated that blackmail was wrong, would not work and that the truth would come out anyway. Dean said Colson talked to Hunt regarding executive clemency. He said possibly Haldeman, who had been involved in the return of \$350,000 to the Committee to Re-Elect the President, and Ehrlichman had no legal guilt in regard to money matters.

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He said nothing in regard to his role regarding money, nor did he discuss his part in the Magruder perjury. See Exhibit I to the complaint.

(d) Defendant President's version at August 22, 1973, news conference: Dean was concerned about raising "hush money" for the defendants. He said there was an attempt to blackmail the White House by one defendant and that, if \$120,000 was not paid, this defendant would reveal his activities in national security matters for which Ehrlichman had "particular responsibility." The President said the figure Dean mentioned as ultimately needed -- one million dollars -- could be raised but that "it's wrong. It won't work," without executive clemency, which he could not give. The President said that getting the money to the defendants was also a "problem" that would make any payoff plan unworkable. The President gave directions "to get this story out."

15. On the afternoon of March 21st, the President met with Dean from 5:20 p.m. to 6:01 p.m. Haldeman was present the entire time, Ronald Ziegler from 5:20 p.m. to 5:25 p.m. and Ehrlichman from 5:25 p.m. to 6:01 p.m.

(a) Dean version: Dean testified that he told the President, with Haldeman and Ehrlichman present, that Dean, Haldeman and Ehrlichman "were all indictable for obstruction of justice." He said it was not possible to perpetuate the cover-up and he would no longer participate in it. See, e.g., Exhibit H to the complaint; S. Tr. 2334-35.

(b) Haldeman version: The meeting dealt with questions of the Grand Jury, the Senate Committee and executive privilege. Ehrlichman stated he believed everyone should go to the Grand Jury; Dean said that would be appropriate if they all first obtained immunity. Ehrlichman was opposed to this idea. See, e.g., Exhibit H

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to the complaint; S. Tr. 6118.

(c) Ehrlichman's version basically corresponds with Haldeman's. See, e.g., S. Tr. 5716-18, 5650.

(d) Buzhardt version: It was tentatively decided that everyone would go to the Grand Jury. Dean, however, wanted immunity. Ehrlichman opposed this and also suggested that no one should claim executive privilege. Haldeman recommended that the whole affair be reduced to paper and the resulting document then released by the White House. The President instructed that these matters be discussed with Mitchell. See Exhibit I to the complaint.

16. In regard to tapes of the five foregoing conversations and other tapes informally requested by the Select Committee, the defendant President, in his letter dated July 23, 1973, to Chairman Ervin (Exhibit G to the complaint) stated:

"The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways."

17. The subpoena appended to the complaint as Exhibit D directed the defendant President to make available to the Select Committee documents and other materials "relating directly or indirectly to an attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972." (Emphasis added)

18. Plaintiffs and their counsel have not seen the documents subpoenaed and therefore cannot identify them with specificity. However, testimony before the Select Committee suggests certain documents within defendant President's possession, custody and control that the subpoena may cover, for example:

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(a) The notes taken by H. R. Haldeman on yellow legal pads during his conversations with the defendant President respecting Watergate and related matters. Mr. Haldeman testified that the pages on which these notes were recorded are, in bulk, less than 1/8 inch in thickness. S. Tr. 6054.

(b) The daily news summaries prepared for the defendant President that contain in the margins or otherwise his handwritten comments and instructions relating to the Watergate affair. S. Tr. 2555.

(c) The various memoranda concerning the ITT affair referred to in a memorandum from Charles Colson to H. R. Haldeman, dated March 30, 1972, that was marked for identification before the Select Committee (see S. Tr. 6655) and is attached to this statement. The White House has already turned over an ITT file to the Special Prosecutor that may contain one or more of these memoranda or other materials that are covered by the Select Committee's subpoena.

19. The defendant President has himself revealed and has authorized and allowed his aides and subordinates, both present and past, to reveal the subject matters and contents of the materials sought by the two subpoenas, as discussed in paragraphs 20-24 below.

20. In his statement of May 22, 1972, the defendant President declared:

"Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

The defendant President' entire statement of that date is appended

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to the complaint as Exhibit J. The testimony before the Select Committee from former and present aides and subordinates to defendant President relating to the criminal conduct under investigation by the Select Committee has been voluminous.

21. The defendant President's counsel, Leonard Garment, stated in a letter of June 19, 1973, to John Wesley Dean III, the defendant President's former counsel, that the defendant President would invoke neither executive privilege nor the attorney-client privilege in regard to Mr. Dean's testimony before the Select Committee. (This letter is attached to the complaint as Exhibit K.)

22. The defendant President, in July 1973, had certain tapes, including the tape recording of his conversation with Mr. Dean on September 15, 1972, delivered to H. R. Haldeman, a private citizen. Mr. Haldeman was asked by the defendant President to listen to the September 15th tape in order to assist the defendant President in preparing a response to the allegations made by Mr. Dean regarding that meeting. The defendant President, by his counsel, subsequently advised Mr. Haldeman that he would not invoke executive privilege in regard to Mr. Haldeman's testimony before the Select Committee concerning the contents of the September 15th tape and a portion of the March 21, 1973, tape (to which Mr. Haldeman also listened) that recorded the discussion between the defendant President and Mr. Dean during the time Mr. Haldeman was present. (See letter of August 10, 1973, to Chairman Ervin from Frank H. Strickler, Haldeman's attorney, which is attached to this statement.)

23. In early June 1973, the White House transmitted to the Select Committee a memorandum listing the oral communications, both face-to-face and telephonic, between the defendant President and Mr. Dean in 1972 and 1973. This memorandum also detailed the dates and times of these communications and, in the case of

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face-to-face meetings, the locations of those meetings and the other participants, if any. Subsequently, Fred D. Thompson, the Select Committee's Minority Counsel, received a telephone call from J. Fred Buzhardt, Special Counsel to the President, during which Mr. Buzhardt, in considerable detail, gave Mr. Thompson his understanding of the contents of certain communications between the defendant President and Mr. Dean. Mr. Buzhardt's reconstructions were immediately reduced to a memorandum by Mr. Thompson. See Exhibit I to the complaint.

24. In his San Clemente press conference on August 22, 1973, defendant President presented his views as to portions of the conversations between him and Mr. Dean on September 15, 1972, and March 21, 1973. His conclusions as to the contents of the tapes, found in his July 23rd letter to Chairman Ervin, is quoted above at Para. 16. Moreover, his May 22nd statement (Exhibit J to the complaint) contains his version of the entire Watergate affair.

Respectfully submitted,

Sherman Cohn

Samuel Dash
Chief Counsel

Eugene Gressman

Fred D. Thompson
Minority Counsel

Jerome A. Barron
Washington, D. C.
Of Counsel

Rufus Edmisten
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Arthur S. Miller
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the Select Committee
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James Hamilton
Assistant Chief Counsel

Richard B. Stewart
Special Counsel

Ronald Rotunda
Assistant Counsel

August 29, 1973

United States Senate
Washington, D.C. 20510
Telephone Number 225-0531
Attorneys for Plaintiffs

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EX121p1

March 30, 1972

MEMORANDUM FOR: H. R. HALDEMAN
FROM: CHARLES COLSON
SUBJECT: ITT

There are four points in the analysis you outlined to MacGregor and me this morning with which MacGregor, Wally Johnson and I disagree.

1. Mitchell, Kleindienst or Mardian dealing with Eastland and MacGregor presumably dealing with the other members of the Committee guarantees a divided approach. One or the other has to call the shots. Kleindienst has already this morning told MacGregor that he, MacGregor, should not deal with any of the other Republican Senators (Scott, Cook, etc.) but rather should deal only through Hruska. In the kind of day-to-day operation this is, that is simply an untenable arrangement.

I know you and the President are concerned that all of us are taken away from other more important matters. You should be, however, equally concerned that Mitchell in the last 30 days has done little with respect to the campaign and that may be a more serious loss than MacGregor's time and mine.

2. On the one hand, you have the assessment of Kleindienst, Mardian and Mitchell as to what will happen in the Committee and on the Floor. On the other hand, you have the legislative assessment of MacGregor, Colson and Johnson which is very different. (Johnson spent from 1968-1970 as Minority Counsel of this same Committee and has been involved in all of the confirmation battles of this Administration either from the Committee end or from the Justice Department end. He left the Committee to go to Justice in 1970. MacGregor spent 10 years in Congress. I spent 5 years as a senior Senate assistant and 9 years in law practice, involving very considerable contact with the Hill. The Justice team simply has not had the same experience.)

4/4/72
JBS
RS/CWB

Ex 121 p. 2

Admittedly it is not much of an option. We are all conservative and I unanimously do not believe that Kleindienst can be confirmed by June 1. Johnson does not feel he can be confirmed at all and on this point I am at least doubtful. I emphasize that this is an opinion and a judgment call. Lots of things could happen. We could get a big break in the case; the media could turn around and become sympathetic to Kleindienst; the Democrats could decide that they are better having him in the job than beating him. Obviously, there are many unforeseen possibilities, but as of now that is our best assessment. I would think that whatever decision we make now should be based on the most knowledgeable -- and I would add the most detached -- assessment of our legislative prospects.

Wally Johnson has done a detailed analysis of the various procedural moves that are likely to be made in Committee or on the Floor. He is not shooting from the hip. He has analyzed it and a Senate vote in his judgment cannot be achieved by June 1; the Democrats will only let it come to a vote if they have votes to reject Kleindienst, which is the least desirable outcome. Neither Johnson, MacGregor or Colson are prepared to predict whether we can hold the votes necessary to confirm him should the nomination in fact get to a vote.

3. Assuming MacGregor, Johnson and Colson are correct, then setting June 1 as our deadline date merely puts the hard decision off to a time when it will be considerably more volatile politically than it is today. Kleindienst's withdrawal will then be an admission of defeat but it will come two months closer to the election. There will have been two months more of rancor and publicity. In June Kleindienst will be a hot issue for the Democratic Convention. Confirmation of Kleindienst's replacement will also be vastly more difficult in June than it would be now. Obviously this again is opinion.
4. The most serious risk for us is being ignored in the analysis you gave us this morning -- there is the possibility of serious additional exposure by the continuation of this controversy. Kleindienst is not the target; the President is, but Kleindienst is the best available subject for the Democrats to use to sustain their position. Make no mistake, the Democrats want to keep this case alive -- whatever happens to Kleindienst -- but the battle over Kleindienst elevates

Ex 121 p. 3

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the visibility of the ITT matter and, indeed, guarantees that the case will stay alive. It may stay alive in any event and hence the key question not addressed in your analysis is whether penance or withdrawal of the Kleindienst nomination serves to increase the Democrat's desire to continue. That is the hardest call to make but for the following reasons it may be the most important point to make.

Mother Kleindienst, Mitchell nor Mardian know of the potential dangers. I have deliberately not told Kleindienst or Mitchell since both may be recalled as witnesses and Mardian does not understand the problem. Only Fred Fielding, myself and Ehrlichman have fully examined all the documents and/or information that could yet come out. A summary of some of these is attached.

EX-11-p4

1. Certain ITT files which were not shredded have been turned over to the SEC; there was talk yesterday in the Committee of subpoenaing these from ITT. These files would undermine Griswold's testimony that he made the decision not to take the appeal to the Supreme Court. Correspondence to Connally and Peterson credits the delay in Justice's filing of the appeal to the Supreme Court in the Grinell case to direct intervention by Peterson and Connally. A memo sent to the Vice President, addressed "Dear Tod", from Ned Gerry toads to contradict John Mitchell's testimony because it outlines Mitchell's agreement to talk to McLaren following Mitchell's meeting with Geneen in August 1970.

It would carry some weight in that the memo was written contemporaneous with the meeting. Both Mitchell and Geneen have testified they discussed policy only, not this case, and that Mitchell talked to no one else. The memo further states that Ehrlichman assured Geneen that the President had "instructed" the Justice Department with respect to the bigness policy. (It is, of course, appropriate for the President to instruct the Justice Department on policy, but in the context of these hearings, that revelation would by this case on the President's doorstep.) There is another internal Ryan to Merriam memo, which is not in the hands of the SEC; it follows the 1970 Agnew meeting and suggests that Kleindienst is the key man to pressure McLaren, implying that the Vice President would implement this action. We believe that all copies of this have been destroyed.

2. There is a Klein to Haldeman memo dated June 30, 1971 which of course precedes the date of the ITT settlement, setting forth the \$400,000 arrangement with ITT. Copies were addressed to Magruder, Mitchell and Timmons. This memo put the AG on constructive notice at least of the ITT commitment at that time and before the settlement, facts which he has denied under oath. We don't know whether we have recovered all the copies. If known, this would be considerably more damaging than Rieneke's statement. Magruder believes it is possible, the AG transmitted his copy to Magruder. Magruder doesn't have the copy he received; he only has a Xerox of the copy. In short, despite a search this memo could be lying around anywhere at 1701W

Ex121p.5

3. The Justice Department has thus far resisted a request for their files, although their files were opened to Robert Hammond, one of Turner's deputies and a hold-over who is now a practicing Democratic lawyer in Washington. Hammond had access to several memos that could be embarrassing. Whether he kept them or not is unknown, but it is probable that he recalls them. One is a memo of April 1969 from Kleindienst and McLaren to Ehrlichman responding to an Ehrlichman request with respect of the rationale for bringing the case against ITT in the first place. There is a subsequent April 1970 memo from Hullin to McLaren stating that Ehrlichman had discussed his meeting with Genecon with the AG, and suggesting to McLaren that Mitchell could give McLaren "more specific guidance". There is another memo of September 1970 from Ehrlichman to the AG referring to an "understanding" with Genecon and complaining of McLaren's actions. There is a May 5, 1971 memo from Ehrlichman to the AG alluding to discussions between the President and the AG as to the "agreed upon ends" in the resolution of the ITT case and asking the AG whether Ehrlichman should work directly with McLaren or through Mitchell. There is also a memo to the President in the same time period. We know we have control of all the copies of this, but we don't have control of the original Ehrlichman memo to the AG. This memo would once again contradict Mitchell's testimony and more importantly directly involve the President. We believe we have absolute security on this file within Justice, provided no copies were made within Justice and provided there are no leaks. We have no idea of the distribution that took place within Justice.
4. Merriam's testimony will of necessity involve direct contact with Jack Gleason. I can't believe that after Merriam's testimony, Gleason will not be called as a witness..

DGER J. WHITEFORD 1969-1965

RING GOLD HART 1966-1968

JOHN J. CARMODY 1961-1972

JANN J. WILSON

LARRY L. RYAN, JR.

JO V. MORGAN, JR.

FRANK H. STRICKLER

WILLIAM E. ROLLOW

CHARLES J. STETT

JOHN J. CARMODY, JR.

JAMES EDWARD AHNARD

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COUNSEL

DONALD L. HERSKY 1972

LAW OFFICES

WHITEFORD, HART, CARMODY & WILSON

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August 10, 1973

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The Honorable Sam J. Ervin, Jr.
Chairman
Senate Select Committee on
Presidential Campaign Activities
United States Senate
New Senate Office Building, G308
Washington, D. C. 20510

Dear Senator Ervin:

After Mr. Haldeman finished his testimony I had a further discussion with him concerning details of his receipt and return of the President's tapes in July of this year. Mr. Haldeman has asked me to advise the Select Committee of the following details.

He believes that on July 10, 1973, he received the tape machine and the September 15 tape (plus phone call tapes for that day) from Steve Bull, who delivered them to Mr. Haldeman in a case at the residence of Larry Bigby. Mr. Bull was on his way home when delivery was made. Mr. Haldeman took them to his residence later that evening and played the full tape of the September 15 meeting. He did not play the telephone tapes. After listening to the tape, he placed the tapes and the machine in the case and left same in his closet.

The next morning, July 11, 1973, Steve Bull delivered tapes of the President's meetings with Dean on three other dates. Mr. Haldeman is not sure what the other dates were. He also believes he was given some telephone tapes, for at least some of the same dates. Mr. Bull delivered these items in a manila envelope to the office Mr. Haldeman was using in the Executive Office Building. Mr. Haldeman took those tapes but, as he

WHITEFORD, HART, CARMODY & WILSON

- 2 -

explained during the hearing, he did not listen to any of them.

On July 12, 1973, Mr. Haldeman put the tapes in the manila envelope into the case with the machine and other tapes and returned the whole package to Steve Bull, who he thinks picked up the case at the Executive Office Building.

I have discussed this matter with Mr. Fred D. Thompson, and am following his advice in sending this letter to you with the request that it be incorporated into the hearing record. If you desire a more formal submittal, please let me know.

Respectfully yours,



Frank H. Strickler

cc Hon. Howard H. Baker, Jr.
Hon. Herman E. Talmadge
Hon. Daniel K. Inouye
Hon. Joseph M. Montoya
Hon. Edward J. Gurney
Hon. Lowell P. Weicker, Jr.

Hon. Samuel Dash
Hon. Fred D. Thompson

PAGE 133
Ex 113**THE WHITE HOUSE**
WASHINGTON

July 30, 1973

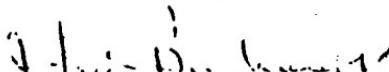
Dear Mr. Wilson:

This concerns your inquiry as to the extent of the President's waiver of executive privilege with regard to the testimony of Mr. Haldeman before the Senate Select Committee on Presidential Campaign Activities. Your inquiry was directed to Mr. Haldeman's knowledge of the contents of tape recordings of conversations of meetings in the President's office on September 15, 1972 and March 21, 1973.

Under the waiver of Executive Privilege stated by the President on May 22, 1973, Mr. Haldeman is not constrained by any claim of executive privilege as to conversations at meetings which Mr. Haldeman attended, if such conversations fall within the May 22, 1973 guidelines.

If asked to testify as to facts which he learned about meetings or portions of meetings which he did not attend, but of which he learned solely by listening to a tape recording of such meeting, the President has requested that you inform the Committee that Mr. Haldeman has been instructed by the President to decline to testify to such matters, and that the President, in so instructing Mr. Haldeman, is doing so pursuant to the constitutional doctrine of separation of powers.

Sincerely,


FRED BUZHARDT

Special Counsel to the President

Mr. John Wilson
Whiteford, Hart, Carmody & Wilson
815 Fifteenth Street, N. W.
Washington, D. C. 20005

93d CONGRESS
1st SESSION

S. RES. 194

IN THE SENATE OF THE UNITED STATES

NOVEMBER 2, 1973

Mr. ERVIN (for himself, Mr. BAKER, Mr. GURNEY, Mr. INOUYE, Mr. MONTOYA, Mr. TALMADGE, and Mr. WICKER) submitted the following resolution; which was ordered to be placed on the calendar

NOVEMBER 7, 1973

Considered and agreed to

RESOLUTION

Relating to S. Res. 60.

1 *Resolved*, That—

2 SECTION 1. By S. Res. 60, Ninety-third Congress, first
3 session (1973), section 3 (a) (5), the Select Committee on
4 Presidential Campaign Activities was and is empowered to
5 issue subpoenas for documents, tapes, and other material to
6 any officer of the executive branch of the United States Gov-
7 ernment. In view of the fact that the President of the United
8 States is, as recognized by S. Res. 60, an officer of the
9 United States, and was a candidate for the office of President
10 in 1972 and is therefore a person whose activities the select
11 committee is authorized by S. Res. 60 to investigate, it is

1 the sense of the Senate that the select committee's issuance
2 on July 23, 1973, of two subpenas duces tecum to the Pres-
3 ident for the production of tapes and other materials was
4 and is fully authorized by S. Res. 60. Moreover, the Senate
5 hereby approves and ratifies the committee's issuance of
6 these subpenas.

7 SEC. 2. On August 9, 1973, the select committee and its
8 members instituted suit against the President of the United
9 States in the United States District Court for the District of
10 Columbia to achieve compliance with the two subpenas re-
11 ferenced in section 1 above, and since that time, in both the
12 district court and the United States Court of Appeals for the
13 District of Columbia Circuit, have actively pursued this litiga-
14 tion. It is the sense of the Senate that the initiation and pur-
15 suit of this litigation by the select committee and its members
16 was and is fully authorized by applicable custom and law,
17 including the provisions of S. Res. 262, Seventieth Congress,
18 first session (1928). In view of the entirely discretionary
19 provisions of section 3 (a) (6) of S. Res. 60, it is further
20 the sense of the Senate that the initiation of this lawsuit did
21 not require the prior approval of the Senate. Moreover, the
22 Senate hereby approves and ratifies the actions of the select
23 committee in instituting and pursuing the aforesaid litigation.

24 SEC. 3. The select committee and its members, by issuing
25 subpenas to the President and instituting and pursuing litiga-

1 tion to achieve compliance with those subpoenas, were and
2 are acting to determine the extent of possible illegal, im-
3 proper, or unethical conduct in connection with the Pres-
4 idential campaign and election of 1972 by officers or
5 employees of the executive branch of the United States Gov-
6 ernment or other persons. It is the sense of the Senate that,
7 in so doing, the select committee and its members were and
8 are engaged in the furtherance of valid legislative purposes,
9 to wit, a determination of the need for and scope of corrective
10 legislation to safeguard the processes by which the President
11 of the United States is elected and, in that connection, the
12 informing of the public of the extent of illegal, improper, or
13 unethical activities that occurred in connection with the
14 Presidential campaign and election of 1972 and the involve-
15 ment of officers or employees of the executive branch or
16 others therein. It is further the sense of the Senate that the
17 materials sought by the committee's subpoenas are of vital
18 importance in determining the extent of such involvement
19 and in determining the need for and scope of corrective
20 legislation.

PUBLIC LAW 93-190

Ninety-third Congress of the United States of America

AT THE FIRST SESSION

*Begin and held at the City of Washington on Wednesday, the third day of January,
one thousand nine hundred and seventy-three*

An Act

To confer jurisdiction upon the district court of the United States of certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution Numbered 60, to enforce or secure a declaration concerning the validity of any subpoenas or order heretofore or hereafter issued by said Committee to the President or the Vice President or any other officer of the United States or any officer or employee of any department or agency of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said Committee is authorized to investigate, and the said District Court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order.

(b) The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said Committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to the matters the Committee is authorized to investigate, and pray the said District Court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order.

(c) The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said Committee under this Act.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

SC 181513
SACR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2086

September Term, 1973
Civil Action 1593-73

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, United States Court of Appeals for the District of Columbia Circuit et al.,

Appellants

v.

FILED DEC 28 1973

Richard M. Nixon, Individually and as President of the United States,

HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson, MacKinnon and Wilkey, Circuit Judges

O R D E R

On consideration of appellants' motion for expedited briefing and argument schedule and suggestion for hearing en banc and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court, en banc, that this case is remanded to the United States District Court for the District of Columbia for further proceedings in light of Pub. L. No. 93-190, to be codified as 18 U.S.C. § 1364.

The Clerk is directed to issue a certified copy of this order to the District Court forthwith.

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES, ET AL.,)
Plaintiffs,)
v.) Civil Action No. 1593-73
RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES,)
Defendant.)

O R D E R

The Court, upon consideration of the briefs, pleadings and other papers filed with regard to the attached subpoena duces tecum issued by the Senate Select Committee on Presidential Campaign Activities for the production of five specifically designated tape recordings of presidential conversations, finds that the President's claim of executive privilege, set forth generally in three letters to the Chairman of the Select Committee dated July 6, 23 and 25, 1973, is too general and not sufficiently contemporaneous to enable the Court to determine the effect of that claim under the doctrine of Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989, at 28-33 (D.C. Cir. Oct. 12, 1973), decided subsequent to the letters and initial proceedings in this case. Accordingly, the Court respectfully requests that the President submit, through counsel, on or before February 6, 1974, a particularized statement addressed to specific portions of the subpoenaed tape recordings indicating whether he still wishes to invoke executive privilege as to these tapes and, with regard to those portions as to which the privilege is still asserted, if any, the factual ground or grounds for his determination that

-2-

disclosure to the Select Committee would not be in the public interest. This statement must be signed by the President, for only he can invoke the privilege at issue, United States v. Burr, 25 Fed. Cas. 187 (Case No. 14,694), 192 (1807), and will be made part of the public record in this case. If the President so desires, the Court will also review, in camera and ex parte, transcripts of any tape recordings referred to in the President's statement and will take them into consideration in determining the sufficiency of the privilege claimed, provided that such transcripts are submitted with the requested statement.

SO ORDERED.

Frederick A. Seely
UNITED STATES DISTRICT JUDGE

January 25, 1974.

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CC

Exhibit C

UNITED STATES OF AMERICA 1593-73
CONGRESS OF THE UNITED STATES
SUBPOENA DUCES TECUM
ENCL

AUG 9 1973

To: President Richard M. Nixon, The White House, Washington, D. C.
JAMES F. DAVEY, Clerk

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone messages of the below listed conversations or oral communications, telephonic or personal, between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to the break-ins at the Democratic National Committee offices on or about May 27, 1972, and on or about June 17, 1972, and any efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above incidents at the dates and times of the attached list of conversations;

EILEEN

September 15, 1972 (personal) 5:27 p.m. to 6:17 p.m.

February 28, 1973 (personal) 9:12 a.m. to 10:23 a.m.

March 13, 1973 (personal) 12:42 p.m. to 2:00 p.m.

March 21, 1973 (personal) 10:12 a.m. to 11:55 a.m.

and 5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the
pains and penalties in such cases made and provided.

To Rufus L. Edmisten, Harry F. Lehrer

to serve and return.

Given under my hand, by order of the
committee, this 23rd day of July, in the
year of our Lord one thousand nine hundred
and seventy-three.

Sam J. Ervin, Jr.

Chairman, Senate Select Committee on
Presidential Campaign Activities

SERVED ON RECONCILIATION BUREAU, ON PAROLE OF
THE PRESIDENT.

TIME: 6:15

DATE: July 23, 1973

PLACE: Executive Office Bldg, White House

Rufus L. Edminson

Terry J. Leugue

7/23/73

Received on behalf of the President
by Leonard Garment
Council to the President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES, ET AL.,)
Plaintiffs,)
v.) Civil Action No. 1593-73
RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES,)
Defendant.)

O R D E R

The Court respectfully requests the Watergate Special Prosecutor to file with the Court and serve upon all parties, by February 6, 1974, a statement concerning the effect, if any, that compliance with the attached subpoena issued by the Senate Select Committee on Presidential Campaign Activities would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision.

SO ORDERED.



UNITED STATES DISTRICT JUDGE

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cc

Exhibit C

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES
SUBPOENA DUCES TECUM

1593-73

ENCL/ED

AUG 9 1973

JAMES F. DAVEY, Clerk

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone messages of the below listed conversations or oral communications, telephonic or personal, between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to the break-ins at the Democratic National Committee offices on or about May 27, 1972, and on or about June 17, 1972, and any efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above incidents at the dates and times of the attached list of conversations:

SAC - J.W.

ELITE CO

PENNSYLVANIA

September 15, 1972 (personal) 5:27 p.m. to 6:17 p.m.
February 28, 1973 (personal) 9:12 a.m. to 10:23 a.m.
March 13, 1973 (personal) 12:42 p.m. to 2:00 p.m.
March 21, 1973 (personal) 10:12 a.m. to 11:55 a.m.
and 5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the
pains and penalties in such cases made and provided.

To Rufus L. Edmisten, TERRY F. LAMM
to serve and return.

Given under my hand, by order of the
committee, this 23rd day of July, in the
year of our Lord one thousand nine hundred
and seventy-three.

Sam J. Ervin, Jr.
Chairman, Senate Select Committee on
Presidential Campaign Activities

Served on Leonard Garment, on behalf of
the President.

Time: 6:15

Date: July 23, 1973

Place: Executive Office Bldg, White House

Rufus L. Edmiston

Terry G. Leyne

7/23/73

Received on behalf of the President
D. Lloyd Garment
Council to the President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES, ET AL.,)
Plaintiffs,)
v.) Civil Action No. 1593-73
RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES,)
Defendant.)

O R D E R

On consideration of the President's objections to the attached subpoena duces tecum issued by the Senate Select Committee on July 23, 1973, the Court has concluded that the demand therein for all conceivable types of documents, recordings and photographs relating directly or indirectly to the activities, participation, responsibilities or involvement of 25 named individuals in any allegedly criminal acts relating to the 1972 Presidential campaign is too vague and conclusory to permit a meaningful response, overlooks the restraints of specificity and reasonableness which derive from the Fourth Amendment and is wholly inappropriate given the stringent requirements applicable where a claim of executive privilege has been raised.

Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989, at 28-33 (D.C. Cir. Oct. 12, 1973). See also McPhaul v. United States, 364 U.S. 372, 382-83 (1960); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946); See v. City of Seattle, 387 U.S. 541, 544 (1967); In re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575, 577-79 (S.D.N.Y. 1961), and cases cited therein. The subpoena is accordingly quashed and the Committee's prayer for its enforcement denied.

SO ORDERED.

January 25, 1974.

George A. Tamm
UNITED STATES DISTRICT JUDGE

Exhibit 9

1593-73

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES ~~EMBLED~~
SUBPOENA DUCES TECUM AUG 9 1973
JAMES E. DAVEY, Clerk

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all records, or copies of records including but not limited to, documents, logs, records, memoranda, correspondence, news summaries, datebooks, notebooks, photographs, recordings or other materials relating directly or indirectly to the attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to, the break-ins of the Democratic National Committee offices on or about May 27, 1972 and on or about June 17, 1972, the surveillance, electronic or otherwise of said offices, and efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above stated matters.

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WED 10 1970

EX-15 E 9

Hereof fail not, as you will answer your default under the
pains and penalties in such cases made and provided.

TO Rufus L. Edmisten, JAMES F. LINDNER
to serve and return.

Given under my hand, by order of the
committee, this 23rd day of July, in
the year of our Lord one thousand nine
hundred and seventy-three

Sam J. Ervin Jr.
Chairman, Senate Select Committee on
Presidential Campaign Activities.

Buchanan, Patrick J.

Butterfield, Alexander P.

Campbell, John

Caulfield, Jack

Chapin, Dwight

Colson, Charles

Dean, John

Ehrlichman, John

Fielding, Fred

Haldeman, H. Robert

Higby, Larry

Howard, Richard

Hunt, E. Howard

Kehrli, Bruce

Krogh, Egil

LaRue, Frederick

Liddy, G. Gordon

Magruder, Jeb Stuart

Mitchell, John

Moore, Richard A.

Shumway, DeVan

Strachan, Gordon

Timmons, William

Young, David

Ziegler, Ron

Served on: President received an
Time: 6:35 Bill of the President
Date: July 23, 1973
Place: The White Executive Office Building,
White House

Rufus T. Edmonds

Jerry F. Gray
7/23/73

Received on behalf of the President
By: Conrad Gramont
Counsel to the President

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN)
ACTIVITIES, SUING IN ITS)
OWN NAME AND IN THE NAME OF)
THE UNITED STATES, et al.,)
' Plaintiffs,)
v.) Civil Action No. 1593-73
RICHARD M. NIXON, INDIVIDU-)
ALLY AND AS PRESIDENT OF THE)
UNITED STATES,)
Defendant.)

MEMORANDUM OF THE SPECIAL PROSECUTOR

The Special Prosecutor submits this memorandum pursuant to the order of the Court on January 25, 1974, requesting that the Special Prosecutor file with the Court and serve upon the parties "a statement concerning the effect, if any, that compliance with the [subpoena of the Senate Select Committee on Presidential Campaign Activities for five recordings of Presidential conversations] would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision."

BACKGROUND

The grand jury empanelled in the District of Columbia on June 5, 1972, has been investigating the so-called Watergate break-in and cover-up for more than nineteen months. This investigation already has resulted in pleas of guilty by three persons -- John W. Dean III, Frederick LaRue and Jeb Stuart Magruder -- to one-count informations charging a

conspiracy to obstruct justice and defraud the United States in violation of 18 U.S.C. 371. A fourth person -- Herbert Porter -- has pleaded guilty to making false statements to the Federal Bureau of Investigation in connection with the Watergate investigation, in violation of 18 U.S.C. 1001. And a fifth -- Dwight Chapin -- is now awaiting trial in this Court on four counts of making false statements to the June 1972 Grand Jury, in violation of 18 U.S.C. 1623.

The Special Prosecutor expects that the June 1972 Grand Jury will complete its investigation and return any indictments prior to March 1974. Based upon the public testimony of those individuals who have pleaded guilty, as well as other testimony before the Senate Select Committee on Presidential Campaign Activities, it is only reasonable to assume, as the Court implicitly recognizes in its Order, that indictments in fact will be forthcoming.

In this regard, we should advise the Court that four of the recordings subject to the Senate Select Committee subpoena have been played before the grand jury. The grand jury received these recordings pursuant to its own subpoena duces tecum enforced by Chief Judge Sirica in an order upheld by the Court of Appeals. Nixon v. Sirica, No. 73-1962 (D.C. Cir. October 12, 1973). These recordings will be important

1/ The Special Prosecutor, who is charged with investigating "allegations involving the President, members of the White House staff, or Presidential appointees" (Order of the Attorney General No. 551-73; November 2, 1973), also has been presenting evidence to the grand juries empanelled on August 13, 1973, and January 7, 1974. In addition to the indictment of Egil Krogh, Jr., for false statements (subsequently dismissed when Mr. Krogh pleaded guilty to a civil rights conspiracy) and the indictment of Dwight Chapin mentioned above, it is expected that these grand juries also will return indictments in the near future.

and material evidence at any future trials resulting from the grand jury's investigations, a factor that must be taken into account in assessing the effect of compliance with the Senate Select Committee subpoena.

STATEMENT

The Supreme Court has described the right to a fair trial as "the most fundamental of all freedoms" which "must be maintained at all costs." Estes v. Texas, 381 U.S. 532, 540 (1965). The Special Prosecutor, consistent with his obligation to ensure the integrity of the criminal process and afford all defendants a fair trial, repeatedly has sought to prevent or minimize improper, unwarranted or inflammatory pre-trial publicity.^{2/} It is thus incumbent on the Special Prosecutor to inform the Court that, in his judgment, compliance with the Senate Select Committee subpoena and subsequent airing of the recordings during hearings of the Committee would increase the risk that those indicted could contend

2/ For example, when the Senate Select Committee sought to immunize witnesses Dean and Magruder to obtain their testimony, the Special Prosecutor asked the Court to impose conditions on the grant of immunity, suggesting that the Court might require the exclusion of the broadcast media when the witnesses testified or might require that the witnesses testify in executive session. See "Memorandum on Behalf of the Special Prosecutor on Application for Orders Conferring Immunity", Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973). Similarly, the Special Prosecutor opposed the request of the Democratic National Committee for access to grand jury materials and investigatory files in connection with its civil action arising out of the Watergate break-in, and suggested the sealing of any depositions taken of key Watergate figures. See "Response of the United States to the Motion of Plaintiffs for the Production and Inspection of Grand Jury Minutes and for the Production and Inspection of Documents and for Leave to Depose Persons in Prison", Democratic National Committee v. McCord, Civ. No. 1233-72 (D.D.C.).

In addition, the Special Prosecutor has asked that the Senate Select Committee defer filing any fact-finding report until after the pertinent indictments and trials.

with more force than presently available that widespread pre-trial publicity prevents the Government from empanelling an unbiased jury for the trial of the offenses charged, particularly if compliance comes while the defendants are actually under indictment. ^{3/} See, e.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

But the existence of pre-trial publicity, even widespread publicity, does not support, ipso facto, a claim of prejudicial publicity or require the trial court to take remedial action such as granting a continuance or change of venue. The courts "are not concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). At this time it is impossible to assess the precise impact of such publicity on forthcoming trials, but the following factors should be considered:

First, the degree of publicity generated if there is compliance with the subpoena will depend on how the Senate Select Committee uses the recordings. If the Court holds that the Senate Select Committee subpoena is valid and enforceable, it might be appropriate for the Court to consider imposing reasonable conditions on the use of the recordings or securing voluntary assurance that such restraint will be observed. The Supreme Court has directed trial courts to take all necessary action to "protect their processes from prejudicial outside interferences" which pre-trial publicity

3/ As indicated above, the Special Prosecutor expects that indictments will be returned during February. Even if this Court enforces the Senate Select Committee's subpoena, it can be expected that the Court's order will be stayed pending appeals, perhaps through the Supreme Court. Thus it appears unrealistic to expect a final order, and compliance therewith, prior to the return of indictments.

may inject into criminal proceedings. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Since the Senate Select Committee has invoked this Court's jurisdiction to enforce its subpoena, the Court may have discretion -- subject only to limitations of the separation of powers -- to protect fundamental constitutional interests. Cf. Krippendorf v. Hyde, 110 U.S. 276, 283 (1884). On the separation of powers issue, see generally Doe v. McMillan, 93 S. Ct. 2018 (1973); Powell v. McCormack, 395 U.S. 486 (1969). But cf. Application of United States Senate Select Committee on Presidential Campaign Activities, supra.

Second, any publicity stemming from compliance with the subpoenas would add only marginally to previous publicity. In addition, the publicity, as all prior publicity, will be largely factual. It must be remembered, the issue presented to the courts is not whether a prospective juror is ignorant of the allegations surrounding a prosecution, or even whether he may have some impression about them, but whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). Compare Sheppard v. Maxwell, supra; Rideau v. Louisiana, 373 U.S. 723 (1963).

Third, the material being sought by the Senate Select Committee is of a unique kind. The publicity that already has been generated about Watergate has involved frequently conflicting versions of what was said at particular meetings in the White House. Naturally, that dispute has been of considerable public interest and concern and all of the participants have presented publicly their versions of what transpired, either in sworn testimony or in press releases or news conferences. As the Court of Appeals has held with

respect to the subpoenaed tapes, however, the tapes constitute "the best evidence of the conversations available." Nixon v. Sirica, supra (slip op. at 32). See also United States v. White, 401 U.S. 745, 753 (1971).

We are confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair and prompt trial. Against this background, the Special Prosecutor can say no more than that compliance with the subpoena might provide prospective defendants with one more discrete incident to cite in support of a claim of prejudicial pre-trial publicity. Accordingly, we take no position on whether the Court, if the Senate Select Committee subpoena is otherwise enforceable, should consider the danger of prejudicial pre-trial publicity a decisive factor.

Finally, if the Court decides to direct compliance with the Committee's subpoena, the Special Prosecutor suggests that compliance be limited specifically to delivery of copies,
^{4/} and not the original recordings.
^{5/} As indicated above, the

4/ In Nixon v. Sirica, supra, the court of appeals held that the President's generalized claim of executive privilege is not absolute and "depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case" (slip op. at 28). There, the court held that the privilege "must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case" (slip op. at 30). This "uniquely powerful showing" was based on the "vital function" of the grand jury. Thus, the grand jury's subpoena was enforced because of the paramount public interest in the full and fair investigation of allegations of criminal misconduct by high government officials (slip op. at 31). Clearly, the effect that compliance with another subpoena would have on the integrity of this same investigation must be taken into account in determining whether the public interest lies in sustaining or overruling a claim of privilege in a different context.

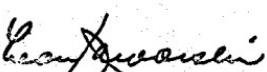
5/ Four of the original recordings, which were subpoenaed by the grand jury, are now in the custody of the District Court, pursuant to the request of Chief Judge Sirica. The White House apparently retains custody of the fifth, the recording of the meeting on February 28, 1973, which was not subpoenaed by the grand jury.

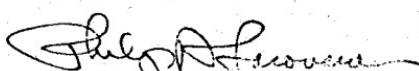
PAGE 160

Special Prosecutor intends to introduce these recordings in evidence at any future trials and, thus, it is essential to maintain, insofar as possible, the authenticity and integrity of the original recordings. Delivery of the originals, at a minimum, would create evidentiary problems, including proof of the chain of custody. Also, since each reel of tape includes six hours of recording, far more than those portions subject to the subpoena, delivery of the original would necessitate excising all non-subpoenaed portions from the original. This would create obvious evidentiary problems. Exact copies of the subpoenaed portions, on the other hand, would satisfy fully the needs of the Senate Select Committee.

The foregoing statement is filed for whatever assistance it may furnish to the Court.

Respectfully submitted.


LEON JAWORSKI
Special Prosecutor


PHILIP A. LACOVARA
Counsel to the Special
Prosecutor


PETER M. KREINDLER
Executive Assistant to
the Special Prosecutor

Watergate Special Prosecution Force
1425 K Street, N. W.
Washington, D. C. 20005

Attorneys for the United States

DATED: February 6, 1974

THE WHITE HOUSE
WASHINGTON

February 6, 1974

Dear Judge Gesell:

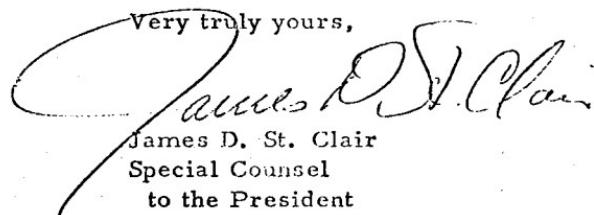
Re Senate Select Committee et al. v. Nixon
Civil Action No. 1593-73

I enclose herewith the President's response to your order of January 25, 1974, in the above entitled proceeding.

I have received a copy of the memorandum of the Special Prosecutor in which he states that four of the recordings described in the Senate Select Committee subpoena were received pursuant to the Special Prosecutor's subpoena.

I believe your Honor should also be aware that the fifth recording was requested of White House Counsel by the Special Prosecutor and was furnished him for the purpose submitting the same to the Grand Jury.

Very truly yours,


James D. St. Clair
Special Counsel
to the President

Honorable Gerhard Gesell
United States Courthouse
Washington, D. C. 20001

CC: Honorable Leon Jaworski

THE WHITE HOUSE

WASHINGTON

February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

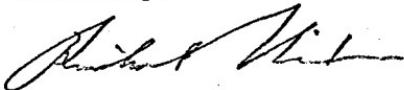
Nevertheless, out of respect for this Court, but without in any way departing from my view that the issues presented here are inappropriate for resolution by the Judicial Branch, I have made a determination that the entirety of the five recordings of Presidential conversations described on the subpoena issued by the Senate Select Committee on Presidential Campaign Activities contains privileged communications, the disclosure of which would not be in the national interest.

I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers

connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,



The Honorable Gerhard A. Gesell
Judge
U. S. District Court
for the District of Columbia
Washington, D.C.

PAGE 164

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, ET AL.,)
Plaintiffs,)
V.) Civil Action No. 1593-73
RICHARD M. NIXON, individually and as President of the United States,)
Defendant.)

MEMORANDUM AND ORDER

The Senate Select Committee on Presidential Campaign Activities desires access to five tape recordings made by the President of conversations between himself and John Wesley Dean, III, then Counsel to the President. These tapes are relevant to the Committee's functions and are identified by date and time. The Committee duly served a subpoena duces tecum on the President demanding production of those portions of the taped conversations which deal with "alleged criminal acts occurring in connection with the Presidential election of 1972."*/ The President refused to comply. Deeming the Senate's own enforcement procedures inappropriate, the Committee sought judicial enforcement of the subpoena, but the Court (Sirica, J.) ruled that it lacked jurisdiction. At the instance of the Committee, Congress then passed a Joint Resolution placing special jurisdiction in this Court to enforce the Committee's subpoenas, and accordingly the issues are again presented for judicial consideration. The Committee seeks a declaratory judgment clarifying its rights and an affirmative injunction directing compliance with the subpoena.

The Committee has moved for summary judgment and the President, through his counsel, resists and asks for dismissal.

*/ The Committee originally issued two subpoenas duces tecum, but only one of the second subpoena was denied by this Court on January 3, 1974.

On the basis of the voluminous papers before the Court and a transcript of the oral argument before Judge Sirica during earlier proceedings in this case, the Court has determined that no further hearings are required and the case is ripe for resolution.

The President at the outset contends that the issue before the Court "constitutes a non-justiciable political question," but the decision of the United States Court of Appeals for the District of Columbia Circuit sitting en banc in Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989/(D.C. Cir. Oct. 12, 1973), is squarely to the contrary and no extended discussion is required. The reasoning of that Court involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee. Baker v. Carr, 369 U.S. 186 (1962), establishes the tests for determining the existence of a "political question," and application of these tests leaves no doubt that the issues presented in the instant controversy are justiciable. See id. at 217. See also Powell v. McCormack, 395 U.S. 486, 518-50 (1969).

Given this determination, it becomes the duty of the Court to weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance. Nixon v. Sirica, supra, at 716-18. This is a difficult but necessary task. The circumstances are unique in our constitutional history. To aid the final determination, the Court requested the Watergate Special Prosecutor to indicate what effect, if any, public disclosure of the subpoenaed tapes by the Committee at this juncture would have on his responsibilities in carrying forward criminal prosecutions. The Court also requested the President to particularize and to update his claim of privilege as it relates to the tapes, since substantial time and many events have intervened since the original issuance of the subpoena. The President's response is attached. The Committee has also elaborated upon its need for the tapes in recently filed papers. The Court has carefully

-3-

weighed these conflicting assertions of public interest in the light of the respective requirements of the parties.

It has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest. Conversely, the Court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications, see Nixon v. Sirica, supra, at 719-20, and the President's unwillingness to submit the tapes for the Court's in camera ex parte inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds. Cf. United States v. Burr, 25 Fed. Cas. 187 (Case No. 14,694), 192 (1807).

On the other hand, both the President and the Special Prosecutor have advanced another factor bearing upon the public interest which the Court finds to be of critical importance -- the need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pretrial publicity.

At this juncture in the so-called Watergate controversy, it is the responsibility of all three branches of the Federal Government to insure that pertinent facts are brought to light, that indictments are fairly and promptly tried, and that any accusations involving the conduct of the President or others are considered in a dignified manner and dealt with in accordance with established constitutional processes. The President, the Congress and the Courts each have a mutual and concurrent obligation to preserve the integrity of the criminal trials arising out of Watergate. The public has been subjected to a mass of information that is both conflicting and uncertain in its implications. Clearly the public interest demands that the

-4-

charges and countercharges engendered be promptly resolved by our established judicial processes. Thus the Court is compelled to weigh the effect that disclosure of the subpoenaed portions of these tapes might have upon criminal trials scheduled or soon to be scheduled on the calendar of this Court.

Three grand juries are now engaged on matters under the Special Prosecutor's jurisdiction. A number of indictments and informations have already been filed and more are expected by the end of this month. The cases will be promptly scheduled for trial. The first trial is set for April 1, with pretrial hearings later this month, at which Mr. Dean will testify. The Special Prosecutor has indicated to the Court his intention of introducing at least four of the five subpoenaed tapes into evidence at some of the trials. All five tapes are now in his possession, and at least four have been played before a grand jury.

No one can doubt that, should the President be forced to comply with the subpoena, public disclosure of these tapes would immediately generate considerable publicity. While it is impossible, as the Special Prosecutor points out, to assess the precise impact of such publicity on the forthcoming judicial proceedings, the risk exists that it would bolster contentions that unbiased juries cannot be impaneled for trial. This is, moreover, in the nature of a test case and should the Committee prevail, numerous additional demands might well be made.*/

The President has a constitutional mandate to see that the laws are faithfully executed and should therefore quite properly be concerned with the dangers inherent in excessive pretrial publicity. That the President himself may be under suspicion does not alter this fact, for he no less than any other citizen is entitled to fair treatment and the presumption

*/ A sweeping subpoena seeking some 500 items has apparently been served on the President more recently, but it has not been brought into this litigation.

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of innocence. The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration.

The Court wishes to emphasize the special circumstances of this particular case which support this conclusion. The five tapes at issue are sought principally for the light that they might shed on the President's own alleged involvement in the Watergate coverup. "[A]llegations involving the President" are among those specifically assigned to the Special Prosecutor for investigation and, if appropriate, for prosecution. The President has, however reluctantly, now provided the Special Prosecutor with all of the information he requires with regard to the five conversations at issue. The tapes themselves have been delivered to the grand juries; all the President's aides participating in the conversations have been permitted to testify under oath concerning the conversations, and the President has invoked neither his Fifth Amendment nor his attorney-client privilege with regard to any of the conversations or related materials he has furnished. To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective in this matter. All of the evidence at hand is to the contrary.

The Committee's role as a "Grand Inquest" into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. The Committee has, of course, ably served that function over the last several months, but surely the time has come to question whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges.

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.

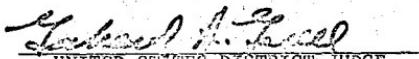
Accordingly, the Court declares that, while the controversy presented is justiciable, the Select Committee has not established by a preponderance of the evidence that it is

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entitled at this particular time to an injunction directing the President to comply with its subpoena for the five tape recordings. The application of the President's counsel for dismissal of the complaint is granted, and the complaint is dismissed without prejudice.

SO ORDERED.



UNITED STATES DISTRICT JUDGE

February 8, 1974.

THE WHITE HOUSE

WASHINGTON

February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

Nevertheless, out of respect for this Court, but without in any way departing from my view that the issues presented here are inappropriate for resolution by the Judicial Branch, I have made a determination that the entirety of the five recordings of Presidential conversations described on the subpoena issued by the Senate Select Committee on Presidential Campaign Activities contains privileged communications, the disclosure of which would not be in the national interest.

I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

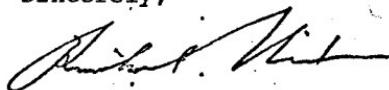
Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers

PAGE 172

-2-

connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,



The Honorable Gerhard A. Gesell
Judge
U. S. District Court
for the District of Columbia
Washington, D.C.

THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN)
ACTIVITIES, suing in its own)
name and in the name of the)
UNITED STATES,)
)
and)
)
SAM J. ERVIN, JR., HOWARD H.)
BAKER, JR., HERMAN E.)
TALMADGE, DANIEL K. INOUE,)
JOSEPH M. MONTOYA, EDWARD)
J. GURNERY, and LOWELL P.)
WEICKER, JR., as United States) No. 74-1258
Senators who are members of the)
Senate Select Committee on)
Presidential Campaign Activities)
)
Appellants)
)
v.)
)
RICHARD M. NIXON, individually and as)
President of the United States)
)
Appellee)

REPLY TO MOTION TO SET EXPEDITED BRIEFING
AND ARGUMENT SCHEDULE AND SUGGESTION
THAT HEARING BE EN BANC

The Appellee, Richard M. Nixon, by his attorneys hereby opposes the expedited briefing schedule proposed by the Appellant, Senate Committee, for the reasons set forth at length hereafter but primarily because the importance of an orderly and complete

-2-

presentation of the significant Constitutional issues raised in this case should not be subordinated to such extreme expedition when the need for such haste has not adequately been established.

Appellee concurs in the suggestion that the hearing in this case be en banc.

On October 17, 1973, Chief Judge John Sirica of the District Court dismissed the instant case for lack of jurisdiction. On October 19th the Senate Committee filed its notice of appeal. Four days later the Senate Committee moved for an expedited briefing and argument schedule. On October 25th, appellants withdrew their request for an expedited briefing and argument schedule and represented "their willingness to be governed by the normal time schedule provided for by the Federal Rules of Appellate Procedure and the general rules of this Court." The appeal was docketed on November 26th, two days before the latest day permitted under FRAP 11(a).

In short, appellants took full advantage of the time period permitted under the rules and then, after the enactment of legislation purporting to confer jurisdiction of this dispute upon the District

-3-

Court, they sought to require the President to accede to a schedule allowing only one week to respond to their brief.

This Court, instead of setting any briefing schedule, remanded the case to the District Court on December 28, 1973, for further proceedings in light of the passage of Public Law 93-190, 28 U.S.C. 1364.

After amendments to the complaint and answer, and the submission of supplementary memoranda by the parties herein and the Special Prosecutor, Judge Gerhard Gesell dismissed the amended complaint without prejudice. The Senate Committee is again before the Court seeking an expedited briefing and argument schedule.

We submit that there is no necessity for shortening the time periods set forth under the Federal Rules of Appellate Procedure. All of the issues raised in this case have serious Constitutional implications. Accordingly, the parties should have the full time permitted under the rules to exercise all of their rights and to prepare full and complete legal memoranda to assist the Court.

-4-

Considering the magnitude and implications of the issues presented in this case, the time allowed for preparation should not be shortened absent some compelling necessity.

The plain fact is that there is no compelling need to expedite these proceedings. The Senate Committee cites its now extended deadline of May 28, 1974, for the submission of its final report as its justification for expeditiousness.

It is submitted that this deadline is, for all practical purposes, self-imposed. It has been extended before by the whole Senate at the request of the Senate Committee. Furthermore, it has been determined that when a subpoena is issued by a Senate Committee under Senate authorization, the subpoena should be treated as though issued by the full Senate. McGrain v. Daugherty, 273 U.S. 135, 158 (1927). Indeed, it can be said that in the case of a Congressional or Senate subpoena, the committee acts as the agent of the House or the Senate. Watkins v. United States, 354 U.S. 178, 200-01 (1957).

-5-

When a litigant urges an expedited briefing schedule because of a self-imposed deadline for the submission of a report, and it fails to provide any rationale for its self-imposed deadline, it should not be permitted to shorten the time permitted for an opposing litigant to respond.

For the foregoing reasons, the Appellant respectfully urges that the motion in behalf of an expedited briefing and argument schedule be denied.

Respectfully submitted,

J. FRED BUZHARDT
JAMES D. ST. CLAIR
ROBERT T. ANDREWS
GEORGE P. WILLIAMS

Of Counsel

CHARLES ALAN WRIGHT
RICHARD A. HAUSER

Attorneys for the President

The White House
Washington, D.C. 20500
Telephone Number: 456-1414

CERTIFICATE OF SERVICE

I, James St. Clair, hereby certify that on this 28th day of February, 1974, I have served the foregoing Reply to Motion to Set Expedited Briefing And Argument Schedule and Suggestion That Hearing Be En Banc on counsel for the plaintiffs by causing copies thereof to be hand-delivered to the office of

Samuel Dash
Chief Counsel
Senate Select Committee on
Presidential Campaign
Activities
United States Senate
Washington, D. C. 20510

James St. Clair

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its
own name and in the name of the
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. GURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities

No. 74-1258

Appellants

v.

RICHARD M. NIXON, Individually and as
President of the United States

Appellee

APPELLANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
EXPEDITED BRIEFING AND ARGUMENT SCHEDULE

The probable effect of the contention of appellee's counsel
that this case should proceed on normal course is apparent. As
appellee's counsel undoubtedly realize, their proposal might result
in postponing final resolution of this case until after the May 28th
report filing date established for the Committee by the full Senate.
Such a result should not be countenanced by this Court. A Committee
of the United States Senate is entitled to prompt, final resolution
of a lawsuit that was brought last August and that, as demonstrated
by S. Res. 194, has the backing of the entire Senate. The Committee

-2-

needs the material in question to prepare its final report and meet its law-making and informing responsibilities, and it should be allowed to fulfill these functions on time.

The appellee's counsel suggest that the May 28th deadline is not a real one because it is "self-imposed", and they imply that further extension of this deadline will be possible. (See p. 4.) These conclusions are inaccurate. The extension of the report filing date to May 28th, which the Committee reluctantly requested, was largely the result of a request by the Special Prosecutor to delay the report until well after the announcement of the Watergate indictments so that plea bargaining following those indictments would not be impaired by the possible interjection of a pretrial publicity defense. Both the Committee and the full Senate, in view of the imminent Watergate prosecutions and the Impeachment proceeding, are anxious to end the Committee's role in Watergate. It is thus highly unlikely that the Committee would seek, or that the Senate would accede to, an extension of the report filing date past May 28th.

Appellee's counsel also suggest (p. 2-3) that the appellants' request for expedition is at odds with appellants' prior conduct before this Court. This is most certainly not the case. When previously before this Court on appeal from Judge Sirica's dismissal for lack of jurisdiction, appellants withdrew their first request for expeditious handling of the appeal because, as they then stated, they believed the quickest way to resolve the jurisdictional issue

-3-

was through the enactment of legislation. This course, appellants stated, would not only lead to a prompter resolution of the entire litigation but would also save considerable judicial time. Surely, there is no inconsistency between that position and the one appellants now present. Appellants have sought expedition at virtually every stage of this litigation.

Appellee asserts the need for time to brief the Constitutional issues involved, but many of the controverted issues herein were fully briefed below by appellee's counsel. Surely, in this circumstance, appellee, with the great resources at his command, can file his brief by Monday week. (Appellants' brief was filed last Monday.) His counsel have agreed to expedition in the past in this case, and there is no good reason why they cannot meet an expedited schedule here, especially since a normal time schedule may deny meaningful resolution of this suit to the Committee and the nation.*/

The President has frequently said that it is in the national interest that investigation of the Watergate affair be promptly brought to conclusion, a proposition to which we would agree so long as the investigation is thorough and those guilty of crimes punished. But the attempt of appellee's counsel to slow the progress of this litigation is contrary to his often expressed desire to lay the Watergate affair to rest. The result of this

*/This Court ordered extreme expedition in the Special Prosecutor's cases and appellee's counsel were able to meet the schedule there imposed. A Committee of the Senate, whose litigation has the express support of the entire Senate, is likewise entitled to expeditious handling of its case.

-4-

attempt might be to prevent final resolution of this suit by delay, a result not in the best interest of the nation and one which this Court should not accept.

Respectfully submitted,

Samuel Dash (R.D.R.)

Samuel Dash

Chief Counsel

Fred D. Thompson

Minority Counsel

Rufus Edmisten

Deputy Counsel

James Hamilton

Assistant Chief Counsel

Richard B. Stewart

Special Counsel

Ronald D. Rotunda

Assistant Counsel

Donald S. Burris

Assistant Counsel

W. Dennis Summers

Assistant Counsel

United States Senate

Washington, D.C. 20510

Telephone Number 225-0531

Sherman Cohn
Eugene Gressman
Jerome A. Barron
Washington, D.C.
Of Counsel

Arthur S. Miller
Chief Consultant
to the Select Committee
Of Counsel

Attorneys for Appellants

March 1, 1974

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

September Term, 1973

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, et al.,

Appellants

Civil Action 1593-73

v.

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 7 1974

HUGH E. KLINE
CLERK

Richard M. Nixon, individually and as President of the United States

Before: Bazelon, Chief Judge; and Wright, McGowan, Leventhal, Robinson, MacKinnon and Wilkey, Circuit Judges

O R D E R

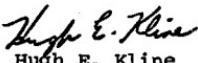
On consideration of Appellants' motion to set expedited briefing and argument schedule and suggestion that hearing be en banc, and of the responsive pleadings filed with respect thereto, and it appearing that under Rule 31(a) of the Federal Rules of Appellate Procedure Appellee's brief is due to be filed on or before March 27, 1974, it is

ORDERED by the Court, en banc, that Appellants' aforesaid motion to set expedited briefing schedule is denied. No extensions of time for the filing of Appellee's brief will be granted.

It is FURTHER ORDERED by the Court, en banc, that this case will be considered by the Court sitting en banc and argument is hereby scheduled for 2:00 p.m. April 17, 1974.

Per Curiam

For the Court:


 Hugh E. Kline
 Clerk

THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN
ACTIVITIES, suing in its own
name and in the name of the
UNITED STATES,

and)

SAM J. ERVIN, JR., HOWARD H.)
BAKER, JR., HERMAN E.)
TALMADGE, DANIEL K. INOUYE,)
JOSEPH M. MONTOYA, EDWARD)
J. GURNEY, and LOWELL P.)
WEICKER, JR., as United States)
Senators who are members of the)
Senate Select Committee on)
Presidential Campaign Activities)

Appellants)

v.)

RICHARD M. NIXON, individually and as)
President of the United States)

Appellee)

RECEIVED
MAR 11 1974
CLERK OF THE UNITED
STATES COURT OF APPEALS

No. 74-1258

MOTION FOR RECONSIDERATION OF DATE SET
FOR ORAL ARGUMENT

Appellants hereby move this Court to reconsider the argument date established by this Court's order of March 7, 1974, and to set oral argument in this cause during the week of April 2, 1974.

- 2 -

The Court has now directed the President to file his brief on March 27 and ruled that argument in this matter will be held en banc on April 17. The present motion for reconsideration asks that argument be held during the week of April 2. Appellants are prepared to file their reply brief on April 2 and suggest that argument be held on that date or shortly thereafter during that week at the Court's convenience. We fail to see how this request can inconvenience appellee who will have the full time allowed under the appellate rules to prepare his brief of appellee.

The schedule now in effect may well mean that this case may not be finally resolved before the May 28 date on which the Committee must file its final report. It will take this Court some period of time to decide this case after the April 17 argument the Court has ordered. Moreover, appeal to the Supreme Court after this Court's decision is quite possible. It thus appears that, unless every step for expedition is taken, this case will languish past May 28.

The Committee has every intention of filing its report by May 28 in accordance with its instructions from the Senate. It is highly unlikely that the Committee will seek further extension of this date or that the Senate would approve an extension. The Committee

recognizes the necessity of promptly completing its work, but needs the vital information subpoenaed to do so. This Court should allow the Committee to meet its mandate on time and thus avoid "needless friction" with the Congress. Compare, Sanders v. McClellan, 150 U.S. App. D. C. 58, 463 F. 2d 894 (1972).

Because of the urgency of the present request, this motion for reconsideration is signed not only by appellants' counsel, but also by all seven members of the Select Committee who bring this appeal.

Respectfully submitted,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr., Chairman

Howard H. Baker

Howard H. Baker, Jr., Vice Chairman

Herman E. Talmadge

Herman E. Talmadge

Daniel K. Inouye

Daniel K. Inouye

Joseph M. Montoya

Joseph M. Montoya

Edward J. Gurney

Edward J. Gurney

Lowell P. Weicker, Jr.

Samuel Dash

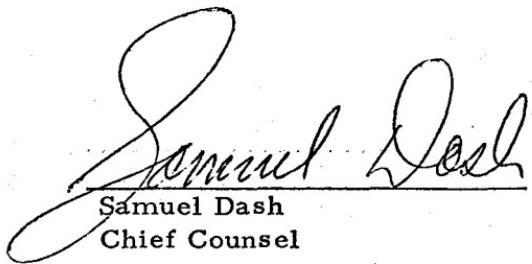
Samuel Dash
Chief Counsel

Fred D. Thompson

Fred D. Thompson
Minority Counsel

CERTIFICATE OF SERVICE

I, Samuel Dash, hereby certify that on this 11th day of March, 1974, I have served the foregoing Motion for Reconsideration on counsel for the defendant by causing copies thereof to be hand-delivered to their offices.



The image shows a handwritten signature in black ink, which appears to read "Samuel Dash". Below the signature, there is a typed name and title: "Samuel Dash" on one line and "Chief Counsel" on the line below it.

Samuel Dash
Chief Counsel

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, et al.,

Appellants

v.

Richard M. Nixon, individually and as President of the United States

September Term, 19₇₃

Civil 1593-73

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 13 1974

HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; and Wright, McGowan, Leventhal, Robinson, MacKinnon, and Wilkey, Circuit Judges

O R D E R

On consideration of Appellants' motion for reconsideration of date set for oral argument, it is

ORDERED by the Court, en banc, that the motion is granted and oral argument in the above entitled case is hereby rescheduled for Tuesday, April 2, 1974 at 10:00 a.m. in the Court of Appeals Courtroom.

Appellants' reply brief, if any, shall be filed by Noon, Monday, April 1, 1974 and need not be printed.

Per Curiam
For the Court:

Hugh E. Kline
Hugh E. Kline
Clerk

Circuit Judges McGowan and Wilkey voted against Appellants' motion for reconsideration.

United States Court of Appeals
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

September Term, 19⁷³

Senate Select Committee on Presidential
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Civil Action 1593-73

Appellants

v.

Richard M. Nixon, individually and
 as President of the United States

United States Court of Appeals
 for the District of Columbia Circuit

FILED MAR 21 1974

HUGH E. KLINE
 CLERK

O R D E R

It is ORDERED, sua sponte, that the Special Prosecutor is requested to file an amicus curiae brief on or before March 27, 1974, and to be prepared to participate in the oral argument which is scheduled for April 2, 1974, if requested.

For the Court:

Hugh E. Kline
 Hugh E. Kline
 Clerk

No. 74-1258

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN
ACTIVITIES, suing in its own name
and in the name of the United States,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE, JOSEPH M. MONTOYA,
EDWARD J. GURNEY, and LOWELL P. WEICKER, JR.,
as United States Senators who are members of
the Senate Select Committee on Presidential
Campaign Activities,

Appellants,

v.

RICHARD M. NIXON,
Individually and as President of the United States,

Appellee.

Appeal from the United States District Court
for the District of Columbia

AMICUS CURIAE BRIEF OF THE SPECIAL PROSECUTOR

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Special Prosecutor

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its own
name and in the name of the United
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and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. GURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities,

Appellants,

v.

RICHARD M. NIXON, Individually and as
President of the United States,

Appellee.

AMICUS CURIAE BRIEF OF THE SPECIAL PROSECUTOR

The Special Prosecutor submits this amicus curiae brief
pursuant to the order of the Court dated March 21, 1974. Due
to the short period allowed for filing this brief, the Special
Prosecutor has not formulated any position with respect to the

two constitutional issues presented to the Court -- whether the issues presented are justiciable and whether the Court, in an action by the Senate Select Committee to enforce its subpoena, may determine de novo whether compliance with the subpoena would be in the public interest. Moreover, the Special Prosecutor believes it would not be appropriate to advise the Court on issues which will not have any collateral effects on matters within his jurisdiction. Accordingly, the Special Prosecutor takes this opportunity only to respond to the concerns regarding possible pre-trial publicity arising from compliance with the Committee's subpoena duces tecum for five Presidential conversations.

STATEMENT

On March 1, 1973, the June 1972 Grand Jury for the District of Columbia returned an indictment charging seven persons with various offenses arising out of the so-called Watergate affair. United States v. Mitchell, et al., Crim. No. 74-110. This same grand jury, in aid of the investigation that led to this indictment, subpoenaed four of the five recordings of Presidential conversations now sought by the Senate Select Committee. The District Court, in accordance with the standards and procedures established by this Court

in Nixon v. Sirica, ___ U.S. App. D.C. ___, 487 F.2d 700 (1973), ruled that these four recordings should be produced to the grand jury.^{1/} The fifth recording -- the recording of the meeting between the President and John Dean on February 28, 1973 -- was produced to the grand jury by the President in response to a request by the Special Prosecutor. Each of these recordings was considered by the grand jury before it returned the indictment in United States v. Mitchell, and the recordings may be important and material evidence at trial.

DISCUSSION

As we have mentioned above, we offer no observations on the underlying constitutional issues. If, however, the Court holds that the Judiciary has power to enforce congressional subpoenas, and if it agrees with the court below that a court has discretion "to weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance" (Op. p. 2), then we submit that the District Court properly took into account the likely effect of compliance with the Committee's subpoena on the trials on any indictments returned by the June 1972 Grand Jury.

1/ See In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, Misc. No. 47-73 (D.D.C. December 19, 1973).

In Nixon v. Sirica, supra, this Court held that a generalized claim of executive privilege "must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." ____ U.S. App. D.C. at ___, 487 F.2d at 717. This "uniquely powerful showing" was based on the "vital function" of the grand jury. Thus, the grand jury's subpoena was enforced because of the paramount public interest in the full and fair investigation of allegations of criminal misconduct by high government officials.

____ U.S. App. D.C. at ___, 487 F.2d at 717-18. The effect that compliance with another subpoena would have on the integrity of this same investigation must be taken into account in any balancing process to determine whether the overall public interest lies in sustaining or overruling such a claim of privilege in a different context.

The Supreme Court has described the right to a fair trial as "the most fundamental of all freedoms" which "must be maintained at all costs." Estes v. Texas, 381 U.S. 532 540 (1965). The Special Prosecutor, consistent with his obligation to ensure the integrity of the criminal process and afford all defendants a fair trial, repeatedly has sought to prevent or minimize improper, unwarranted or

2/

inflammatory pre-trial publicity. It is thus incumbent on the Special Prosecutor to inform the Court that, in his judgment, compliance with the Senate Select Committee subpoena and subsequent airing of the recordings during hearings of the Committee or use of the recordings in formulating a public fact-finding report would increase the risk that the defendants in United States v. Mitchell could contend with more force than presently available that widespread pre-trial publicity prevents the Government from empanelling an unbiased

2/ For example, when the Senate Select Committee sought to immunize witnesses Dean and Magruder to obtain their testimony, the Special Prosecutor asked the Court to impose conditions on the grant of immunity, suggesting that the Court might require the exclusion of the broadcast media when the witnesses testified or might require that the witnesses testify in executive session. See "Memorandum on Behalf of the Special Prosecutor on Application for Orders Conferring Immunity", Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973). Similarly, the Special Prosecutor opposed the request of the Democratic National Committee for access to grand jury materials and investigatory files in connection with its civil action arising out of the Watergate break-in, and suggested the sealing of any depositions taken of key Watergate figures. See "Response of the United States to the Motion of Plaintiffs for the Production and Inspection of Grand Jury Minutes and for the Production and Inspection of Documents and for Leave to Depose Persons in Prison", Democratic National Committee v. McCord, Civ. No. 1233-72 (D.D.C.).

In addition, the Special Prosecutor has asked that the Senate Select Committee defer filing any fact-finding report until after the pertinent indictments and trials.

jury for the trial of the offenses charged. See, e.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

But the existence of pre-trial publicity, even widespread publicity, does not support, ipso facto, a claim of prejudicial publicity or require the trial court to take remedial action such as granting a continuance or change of venue. The courts "are not concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). At this time it is impossible to assess the precise impact of such publicity on forthcoming trials, but the following factors should be considered:

First, the degree of publicity generated if there is compliance with the subpoena will depend on how the Senate Select Committee uses the recordings. If the Court holds that the Senate Select Committee subpoena is valid and enforceable, it might be appropriate, as suggested by the ^{3/} Committee, for the Court to consider imposing reasonable conditions on the use of the recordings or securing voluntary ^{4/} assurance that such restraint will be observed. The Supreme

3/ Brief of Appellants pp. 37-39.

4/ The Committee on the Judiciary of the House of Representatives has adopted rules designed to maintain the confidentiality of information (including recordings of Presidential conversations now in its possession) relating to the impeachment inquiry.

Court has directed trial courts to take all necessary action to "protect their processes from prejudicial outside interferences" which pre-trial publicity may inject into criminal proceedings. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Since the Senate Select Committee has invoked this Court's jurisdiction to enforce its subpoena, the Court may have discretion -- subject only to limitations of the separation of powers -- to protect fundamental constitutional interests.^{5/} Cf. Krippendorf v. Hyde, 110 U.S. 276, 283 (1884).

Second, any publicity stemming from compliance with the subpoenas would add only marginally to previous publicity. In addition, the publicity, as all prior publicity, will be largely factual. It must be remembered, the issue presented to the courts is not whether a prospective juror is ignorant of the allegations surrounding a prosecution, or even whether he may have some impression about them, but whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v.

^{5/} See generally Doe v. McMillan, 93 S. Ct. 2018 (1973); Powell v. McCormack, 395 U.S. 486 (1969). But cf. Application of United States Senate Select Committee on Presidential Campaign Activities, supra.

Appellants indicate that the Committee has waived "separation of powers considerations" (Brief p. 37). The Special Prosecutor takes no position on whether such a waiver is valid or cures any jurisdictional defects or on whether reasonable conditions could be enforced against members of the Committee.

Dowd, 366 U.S. 717, 723 (1961). Contrast Sheppard v. Maxwell, supra; Rideau v. Louisiana, 373 U.S. 723 (1963).

Third, the material being sought by the Senate Select Committee is of a unique kind. The publicity that already has been generated about Watergate has involved frequently conflicting versions of what was said at particular meetings in the White House. Naturally, that dispute has been of considerable public interest and concern and all of the participants have presented publicly their versions of what transpired, either in sworn testimony or in press releases or news conferences. As this Court has held with respect to the subpoenaed tapes, however, the tapes constitute "the best evidence of the conversations available." Nixon v. Sirica, supra, U.S. App. D.C. at ___, 478 F.2d at 718. See also United States v. White, 401 U.S. 745, 753 (1971).

We are confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair and prompt trial. Against this background, the Special Prosecutor can say no more than that compliance with the subpoena might provide prospective defendants with one more discrete incident to cite in support of a claim of prejudicial pre-trial publicity. Accordingly, we take no position on whether the Court,

if the Senate Select Committee subpoena is otherwise enforceable, should consider the danger of prejudicial pre-trial publicity a decisive factor.

Finally, the Special Prosecutor believes it is appropriate to comment on the position he took on behalf of the grand jury with respect to the Grand Jury's Report and Recommendation. The grand jury recommended to the District Court that the Report and Recommendation and accompanying materials be transmitted to the House Judiciary Committee for consideration in connection with the impeachment inquiry. In the oral argument before this Court on the petitions for extraordinary writs barring the District Court from transmitting the materials, Chief Judge Bazelon asked Counsel to the Special Prosecutor whether the Special Prosecutor had considered the risks of pre-trial publicity stemming from transmittal. Counsel responded that both the grand jury and the Special Prosecutor had considered those risks, but that under the circumstances, the public interest clearly weighed in favor of transmittal. Nothing in that position is inconsistent with the ruling of the court below.^{6/} The needs of

6/ The District Court specifically referred to this distinction (Op. p. 5):

Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations.

a congressional committee in furtherance of its legislative
functions^{7/} are far different from the requirements of a committee charged with reporting to the House of Representatives on "whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States." H. Res. 803, 93d Cong., 2d Sess. (February 6, 1974). Judge Sirica, in ruling that the Grand Jury's Report and Recommendation and accompanying materials should be delivered to the House Committee on the Judiciary, stated that "[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information." In re Report and Recommendation of June 5, 1972 Grand Jury, Misc. No. 74-21, at 19 (D.D.C. March 18, 1974) (emphasis added).

7/ Appellants characterized the need of the Senate Select Committee in their brief (pp. 36-37):

Respecting its lawmaking functions, the Committee's chief need at this time is to examine the tapes to determine whether drastic legislation respecting presidential campaigns is required and would eventually receive the public support needed for its passage when the contents of the tapes are revealed. The major concern regarding the informing function is that these tapes be released to the Committee so that at some future time they may be made public and not forever kept secret from the Nation.

Furthermore, in weighing the risk of pre-trial publicity from compliance with the subpoena against the need of the Senate Select Committee in furtherance of its lawmaking functions, this Court must take into account that the President now has provided the recordings in question to the House Committee on the Judiciary. Thus, the Committee's concern that these recordings may be "forever kept secret from the Nation" (Brief p. 37) is no longer founded.

The foregoing views are filed for whatever assistance they may furnish to the Court.

Respectfully submitted.

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DATED: March 27, 1974

No. 74-1258

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its own
name and in the name of the United
States,

and

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;
HERMAN E. TALMADGE; DANIEL K. INOUYE;
JOSEPH M. MONTOWYA; EDWARD J. GURNEY;
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
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Appellants,

v.

RICHARD M. NIXON, individually and as
President of the United States,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

Interest of the United States

The appellants, by this suit, seek an order directing
the President to comply with a subpoena duces tecum requiring
the production of certain tape recordings. In response to

that subpoena duces tecum, the President declined to produce the documents on the basis of Executive privilege (App. 162). The United States has an overriding interest in the proper application of the doctrine of Executive privilege, as well as protection of the integrity of the criminal justice system.

QUESTION PRESENTED

Whether the district court properly refused to enforce the subpoena of the Senate Select Committee.

STATEMENT

In response to a request of the district court, the President, by letter of February 6, 1974, specified the grounds upon which he declined to produce the five taped conversations in issue here (App. 162). In that letter, the President stated that "the disclosure of [the taped conversations] would not be in the national interest" because (1) "the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality" and (2) there would be "possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time" (App. 162). In considering this claim, the district court concluded that "it becomes the duty of the Court to weigh the public interests protected by the President's claim of privilege against the public

interests that would be served by disclosure to the Committee in this particular instance" (App. 165). The court concluded that, because the appellants had not shown a pressing need for the tapes, disclosure should be denied in order to protect the integrity of the criminal justice system (App. 166-170).

ARGUMENT

THE DISTRICT COURT PROPERLY REFUSED TO ENFORCE THE SUBPOENA OF THE SENATE SELECT COMMITTEE.

Appellants contend on this appeal that the district court did not base its decision upon a claim of Executive privilege and that under those circumstances the mere expression by the Committee of its need for the material suffices to require an order compelling production of the tapes (Brief, p. 9). It is clear, however, that the President's letter of February 6, 1974, invoked Executive privilege to prevent pre-trial publicity in criminal matters, as well as to protect the confidentiality of Executive conversations. When the district court weighed the need to prevent unfair pre-trial publicity, it properly recognized that that interest constituted a basis for refusing to enforce the subpoena of the Committee.

In refusing to enforce the subpoena, the district court applied a balancing of interests test in evaluating that

claim of privilege. See Kilbourn v. Thompson, 103 U.S. 168 (1880); Watkins v. United States, 354 U.S. 178 (1957). Under the rule of Nixon v. Sirica, ___ U.S. App. D.C. ___, 487 F. 2d 700, 716 (1973), the court correctly found that the need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pre-trial publicity, outweighed any need shown by the Committee. Certainly, the Committee can make no substantial showing that it needs the tape recordings in order to enact general legislation relating to Presidential elections. Nor, as the district court recognized (App. 168), can production of the tape recordings be justified on the ground that the public interest requires public disclosure by the Committee. On the other hand, there is a clear and obvious need to protect pending and prospective criminal proceedings from pre-trial publicity. See Delaney v. United States, 199 F. 2d 107 (C.A. 1, 1952). Accordingly, the district court was correct in ruling that the Committee had not established by a preponderance of the evidence that it was entitled to an injunction directing the President to comply with the subpoena for the five tape recordings.

In addition, the interest of the President in protecting the confidentiality of Presidential communications in this case also outweighs the needs of the Committee. The

President must preserve a climate in which his staff and the public can communicate freely with him, in which he and they can examine problems and alternative solutions candidly, uninhibited by the fear that later disclosure may bring bitterness and harassment from affected interest groups or a violent public opinion informed by the wisdom of hindsight. In Nixon v. Sirica, supra, 487 F. 2d at 717, this Court recognized that such conversations were presumptively privileged, but that the claim of privilege had to fail in that case because of "the uniquely powerful showing" made by the Special Prosecutor. In this case, however, no such showing has been made. Therefore, the district court's decision declining to enforce the Committee's subpoena can also be sustained on the grounds of confidentiality of Presidential communications.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, suing in its)
own name and in the name of the)
UNITED STATES,)

and)

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Campaign Activities)

No. 74-1258

Appellants)

v.)

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President of the United States)

Appellee)

BRIEF OF APPELLEE

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, suing in its)
own name and in the name of the)
UNITED STATES,)
and)
SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,)
HERMAN E. TALMADGE, DANIEL K. INOUYE,)
JOSEPH M. MONTOYA, EDWARD J. GURNEY,)
and LOWELL P. WEICKER, JR., as United)
States Senators who are members of the)
Senate Select Committee on Presidential)
Campaign Activities)
Appellants)
v.)
RICHARD M. NIXON, individually and as)
President of the United States)
Appellee)

No. 74-1258

BRIEF OF APPELLEECounterstatement of Issues Presented for Review

- I. Whether the District Court properly ruled that the President's immediate interest in faithfully executing the laws and the Judiciary's immediate interest in safeguarding the constitutional right of every individual to a trial free from the probability of prejudicial pretrial publicity outweigh the interest of the Senate Select Committee in making future laws.

II. Whether the District Court properly ruled that the Senate Select Committee failed to meet the burden of proof sufficient to obtain a summary judgment for the relief it sought.

III. Whether the Senate Select Committee may properly request relief from this Court that was not sought from the District Court.

This case was previously before the Court in No. 73-2086. This Court's en banc order remanding the case to the United States District Court is found at Joint Appendix 138^{1/}.

References to Parties and Rulings

All parties to this cause are set forth in the caption. In this cause ^{2/} the appellant, Senate Select Committee on Presidential Campaign Activities, seeks review of the opinion and order of the Honorable Gerhard A. Gesell of the United States District Court for the District of Columbia in C. A. No. 1593-73 entered on February 8, 1974, dismissing this action without prejudice (J. A. 164).

Counterstatement of the Case

This action was originally filed by the Committee on August 9, 1973, seeking enforcement of two subpoenas directed to the President. One of these requested "all conceivable types of documents, recordings and photographs relating directly or indirectly to the activities" (J. A. 148) of 25 individuals with respect to any criminal activities concerning the 1972

1/ Hereinafter the Joint Appendix will be cited as J. A. followed by the appropriate pagination.

2/ Hereinafter referred to as "Committee." The brief of the Committee will be cited as Br. followed by the appropriate pagination.

Presidential campaign. The other, the subject of this appeal, requested five Presidential taped conversations. The President answered on August 29, 1973, and the Committee on the same day filed a motion for summary judgment. At the same time the Committee filed "Plaintiffs Statement of Material Facts As to Which There is No Genuine Issue" (J.A. 110). The facts set forth therein are undisputed for the purpose of this litigation. On October 17, 1973 the District Court dismissed the Committee's complaint and motion for summary judgment for failure to allege a statutory grant of subject matter jurisdiction. The Committee on October 19, 1973 filed a notice of appeal. On October 25 the Committee withdrew its earlier request for expediting the appeal in order to pursue the alternative course of seeking legislation to cure its jurisdictional defect.

That appeal was docketed with this Court on November 26, 1973. The legislation, which the Committee sought, was passed in the form of Public Law 93-190. This took effect on December 19, 1973. On the same date, the Committee filed another motion for an expedited brief schedule.

On December 28, 1973, this Court remanded this case to the District Court "for further proceedings in light of Public Law 93-190" (J.A. 138). On January 7, 1974, this case was reassigned in District Court from Chief Judge John J. Sirica to Judge Gerhard A. Gesell. On the same date the Committee amended its complaint to include a jurisdictional allegation under

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Public Law 93-190. The President's amended answer was filed January 17, 1974. Thus, this matter was placed before the District Court on the Committee's motion for summary judgment.

On January 25, 1974, the District Court quashed the Committee's subpoena duces tecum for the documents relating to the 25 individuals (J.A. 148). The Committee did not appeal this ruling.

On February 6, 1974, the District Court received in response to two of its orders of January 25, 1974, a supplemental memorandum from the Special Prosecutor (J.A. 154) and a letter from the President (J.A. 162).

On February 8, 1974, Judge Gesell dismissed the Committee's complaint without prejudice. It is this action that is the subject matter of this appeal, the Committee filing on February 20, 1974, its notice of appeal.

Argument

I. The District Court properly ruled that the President's immediate interest in faithfully executing the laws and the Judiciary's immediate interest in safeguarding the constitutional right of every individual to a trial free from the probability of prejudicial pretrial publicity outweigh the interest of the Committee in making future laws.

A. The District Court's use of balancing in this case, assuming justiciability, was the proper exercise of a traditional judicial function.

It should be stressed at the outset that we continue to believe that this case is not justiciable. However, it is not necessary for the Court to reach this issue since the decision below was plainly right on the ground on which it rested. If this Court wishes to consider the question of justiciability

we incorporate by reference pp. 3-17 of our Response to Plaintiffs' Memorandum on Remand in the court below, copies of which have been filed with the clerk of this Court.

The Committee begins its argument with a novel contention (Br. 9-10). It suggests that the District Court was not entitled to balance the Committee's asserted legislative need for and proposed publication of the subpoenaed tapes against the probable danger of prejudicial pretrial publicity to the constitutional right to a fair trial. At first glance this seems to be an argument that the question is not justiciable. The Committee thus appears to have accepted our argument below that the case is not justiciable and should properly have been dismissed. This is not, however, the real thrust of the Committee's argument. In essence, what the Committee is saying is that the issue before the Court is only partially justiciable. According to the Committee's logic the District Court may only properly decide this case for the Committee, but it has no power to deny the Committee the relief it seeks.

The Committee, in proposing this odd theory, apparently desires to have its cake and eat it too. It claims that the "usual methods of vindicating Congress' authority are not appropriate" here (Plaintiffs' Memorandum on Remand at p. 16). Instead, the Committee seeks a judicial forum rather

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than relying on direct Senate legislative enforcement of its subpoenas or the contempt procedures embodied in 2 U.S.C. § 192. We take the Committee at its word in seeking the judicial forum for reasons of appropriateness. However, if the Committee seeks to use the judicial process it must recognize that it cannot then turn the courts into mere rubber stamps of the Congress, devoid of the basic substance of the judicial power. As was stated in Hayburn's Case, a case where the Congress attempted to impose non-judicial functions on the federal Circuit Courts:

That neither the Legislative nor the Executive branches can, constitutionally, assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner. Hayburn's Case, 2 Dallas (1 U.S.) 409, 411n(1972).

The hallmark of the judicial process is the ability to find for or against a claimant. If this were not so, then a court's decisions would be illusory and its function "nothing but a rubber stamp."^{3/} Historically, the federal judiciary has strenuously resisted efforts requiring it to perform nonjudicial types of action. Hayburn's Case, supra. Chief Justice Marshall in Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), recognized two fundamental limitations on judicial action: the political question doctrine and the case or controversy limitation. The classic definition of the prohibition on advisory opinions, the requirement of a real case of controversy, was set forth by

3/ Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1280 (1973). Judge Sirica noted that a court does more than merely function as a "rubber stamp" for Congressional requests. 361 F. Supp. at 1278.

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Chief Justice Hughes in Aetna Life Insurance Company of Hartford v. Haworth, 300 U.S. 227 (1937). A power to decide a case only one way is not, in fact, a power to decide at all and would certainly produce the same undesirable result that the case or controversy limitation was designed to prevent, namely, allowing the Judiciary to operate in a non-adversary context.

In further dealing with the Committee's novel contention that the District Court's action in balancing "finds no support in decisional law..." (Br. 7) we need only turn to our fundamental judicial tradition to see otherwise. Just as it is clear that the essential nature of the judicial process supports the District Court's decision, it is equally clear that the cases do also.

In Nixon v. Sirica, this Court noted:

We think the Burr case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case. Nixon v. Sirica, _____ U.S. App. D.C. _____, 487 F. 2d 700, 716 (1973) (emphasis added) (footnote omitted).

If the Executive's most fundamental powers may be weighed by the Court so may the Legislature's. If this were not so, separation of powers would be a mere incantation without substance. In citing Powell v. McCormack, 395 U.S. 486 (1969), which held that the refusal of the House of Representatives to seat a member was reviewable by the Judiciary, even the Committee admits

that the Court's power extends over legislative actions also (Plaintiffs' Memorandum on Remand at p. 13).

There is no power more elementary nor more firmly established than that of the courts, in passing on constitutional issues, to balance conflicting claims of individuals, states, the federal government, and particular branches of the federal government. By way of example, the courts weigh "the conflicting powers of the general and state governments," McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 405 (1819), of individuals against the states, e.g., Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939), of different branches of the federal government, e.g., Nixon v. Sirica, ____ U.S. App. D.C. ____, 487 F. 2d 700, 716 (1973), and -- most clearly in point -- of Congressional power to obtain information against constitutional claims that it need not be produced. See Barenblatt v. United States, 360 U.S. 100, 126 (1959), where the Court said:

Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

This familiar process of balancing is precisely what the District Court did here. The Committee's contention that this balancing "finds no support in decisional law" (Br. 7) is utterly without foundation and belied by a great wealth of judicial precedent, including cases cited by the Committee below (Plaintiffs' Memorandum on Remand at p. 14).

On reviewing previous positions taken by the Committee in this litigation it is difficult to believe that they can now argue that the court below had no power to balance the public interest in deciding whether to grant the relief the Committee sought. Apparently what is good for the plaintiff is bad for the appellant. The Committee began its conclusion to its Memorandum on Remand with these words:

The foregoing discussion demonstrates that application to this case of the balancing test enunciated in Nixon v. Sirica fully vindicates Congress' right to the evidence sought by the Committee. There is a strong public interest in effective legislative investigation of executive wrongdoing. (Plaintiffs' Memorandum on Remand at p. 31).

At another point in the same document in a footnote the Committee approvingly quotes:

Mr. Justice Jackson has written that "[s]ome arbiter is almost indispensable when power... is also balanced between different branches, as the legislative and the executive. . . .Each unit cannot be left to judge the limits of its own power." Jackson, The Struggle For Judicial Supremacy (1941) at p. 9. The wisdom of his observation has a unique relevance to the present case. (Plaintiffs' Memorandum on Remand at p. 18 n).

In another document below the Committee's enthusiasm for "balancing" by the Court is unabated.

There is no reason why this Court should pronounce itself infirm to rule on a claim of privilege asserted against the Congress. The Supreme Court has said that the principle that "the public has a right to every man's evidence" is just as applicable to legislative

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investigations as to judicial proceedings, United States v. Bryan, 339 U.S. 323, 331 (1950) thus indicating that a claim for evidence should not be unreviewable just because it is the Congress that asserts it. (Reply to Defendant's Response to Plaintiffs' Memorandum on Remand at p. 3) (emphasis added).

The Committee seems, however, to speak with a "new" approach in this appeal. Now it finds the District Court's decision to be "an apparently new rule of law" (Br. 7) that allowed the District Court to balance the Committee's legislative need against the danger to the Sixth Amendment rights of criminal defendants. The Committee no longer seems to appreciate "[t]he wisdom of [Justice Jackson's] observation..." (Plaintiffs' Memorandum on Remand at p. 18n). While previously the Committee found a wealth of cases to support the District Court's balancing (Plaintiffs' Memorandum on Remand at pp. 13-14) of constitutional claims like those at issue here, now the Committee can remember none of them (Br. 7, 12).

What has happened seems obvious. The Committee has finally realized the full implications of justiciability. If a court can decide a case it can decide against either party. If a court can balance constitutional claims the balance can fall on either side. If the Committee believes this case is justiciable then it must live with all the implications of that fact. The Committee should not now be heard to argue "heads I win, tails you lose."

The Committee seems to place great weight on Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (1973), to help it breach the separation of powers in the Constitution and overcome the basic lack of legal authority supporting its challenge of the District Court's power to balance. The Committee indicates by implication that the District Court in the present case has power only to comply with the Committee's request for relief. This would make the Court a mere "rubber stamp" of the Congress and raise serious constitutional questions if it were founded in anything other than the Committee's mis-reading of Application of United States Senate Select Committee on Presidential Campaign Activities. It should be noted that in Application Judge Sirica, quoting the language of the Working Papers of the Commission that recommended the immunity act in question (18 U.S.C. § 6005), stated:

[P]roblems both of constitutionality and of insufficiency of information for meaningful judicial scrutiny, have been averted by making the court's function a weak and paltry thing -- ministerial, not discretionary in nature.
361 F. Supp. at 1276.^{4/}

4/ This case is unlike Application, and also unlike such other cases as Ullman v. United States, 350 U.S. 422 (1956), and United Steelworkers of America v. United States, 361 U.S. 1 (1959), in which an Act of Congress requires the courts to grant certain orders when stated prerequisites have occurred, and the matter is held "judicial" because the court must ascertain whether the prerequisites are present.

Thus, if the courts are to be constitutionally involved in non-judicial tasks at all they must be "weak and paltry" or "ministerial" functions. Id. Would any member of the bar seriously suggest that the instant case fits this mold? This truly is a major and historic legal dispute. The argument, controversy, and parties involved bear witness to its non-ministerial nature. Further, the Committee here seeks a declaratory judgment under 28 U.S.C. § 2201. This statute authorizes the court to: "[i]n a case of actual controversy...declare the rights and other legal relations of any interested party... Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such..." 28 U.S.C. § 2201. It is self-evident that if a court can decide an application for declaratory relief at all, it has the power to rule on the merits and not just in favor of the plaintiff. Thus, it is not surprising that the Committee offers no case to support its novel position. Moreover, it is very difficult to even maintain that the District Court was not able to fully decide the case against the Committee because of any suggested analogy to the Application case.

What, however, of the Committee's other asserted argument, where they suggest that the court in Application was unable "to exercise inherent powers [to condition the grant of immunity] in the interest of preserving the rights of potential defendants.' 361 F. Supp. at 1280" (Br. 21). Two

points should be noted that explain and distinguish this issue and one general comment that places the case in its proper context.

First, it should be remembered that in Application Judge Sirica found that there was "one distinguishing feature found in each [of the cases relied upon by the Special Prosecutor in his request invoking the court's inherent powers]." 361 F. Supp. at 1280. This "distinguishing feature" was the fact that in Application there were no actual criminal indictments. Id. These, of course, now exist and played a critical role in Judge Gesell's decision.

Second, it must be remembered what Judge Sirica was refusing to do in Application. He was being asked to either limit immunity or limit broadcast media coverage of the witness' testimony. 361 F. Supp. at 1280. This certainly would have been an "attempt to regulate proceedings before a coordinate branch of government" id., since it would have directly infringed on the Committee's functioning. The District Court decision in this case, however, did almost the opposite of interfering with the Committee. Rather, it only stated that it would not allow its own processes to be used to interfere with its own constitutional responsibilities to provide every individual a fair trial, a trial free from the probability of prejudicial pretrial publicity. It in no way restricted the Committee (J.A. 169).

In general, Application points out that there are two general bases upon which a court can fashion relief in almost every case. There is that discretion which comes from the statutory, constitutional, or common law basis of the court's immediate jurisdiction. There is also an inherent basis that derives from the Judiciary's basic constitutional function. In Application the District Court was denied its discretionary basis by the unique nature of 18 U.S.C. § 6005. Further, the court felt, rightly or wrongly, that it could not exercise its inherent power for granting relief because of a number of factors: lack of actual indictments, interference with the congressional function, and the immunity context. In the instant case the District Court's inherent power is not really at issue since it has more than adequate discretionary power under 28 U.S.C. § 2201 and its equitable powers to decide this case. The District Court found that the Committee's request for a declaratory judgment constituted, in effect, a request for injunctive relief. Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F. 2d. 894 (1972).^{5/}

Under basic equity theory the court always has the power to decide a case against either party on the merits. An appeal to the equity jurisdiction conferred on Federal District Courts is an appeal to "the sound discretion,

^{5/} In Sanders v. McClellan, an action also involving both a suit for a declaratory judgment and an injunction, this Court noted: "In response to this claim [that declaratory relief should be available notwithstanding the unavailability of injunctive relief] the court reasoned, we think correctly, that in the situation presented such relief would amount in substance to an injunction..." Sanders v. McClellan, 150 U.S. App. D.C. 58, 61, 463 F. 2d 894, 897 (1972). Thus the District Court was correct in dismissing the whole case.

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which guides the determination of courts of equity," Beal v. Missouri Pacific Railroad Corp., 312 U.S. 45, 50 (1940). "In its sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." U.S. ex. rel. Greathouse v. Dern, 289 U.S. 352, 360 (1932). In the instant case the court properly recognized that when its equity jurisdiction was invoked it must consider the public interest. Judge Gesell wisely discerned:

The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges. (J.A. 169).

A particularly critical area to our discussion is where the courts balance countervailing constitutional interests concerning the rights of defendants to trials free from the probability of prejudicial pretrial publicity. In the instant case the District Court was undoubtedly guided and properly so by the admonition of the Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966):

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial

publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused... [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

384 U.S. at 362-363 (emphasis added).

Thus when Judge Gesell noted the "concurrent obligation" of the President, the Congress and the Courts "to preserve the integrity of the criminal trials arising out of Watergate" and the fact that the Committee had not demonstrated "a pressing need for the subpoenaed tapes" and when he questioned "whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity" he was engaging in a balancing process that is the essence of the judicial function (J.A. 166, 169). In reaching its careful balance the District Court noted:

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture (J.A. 169).

In balancing the constitutional interests in this case, the District Court properly recognized the Constitution's separation of powers and avoided the "needless friction with a coordinate branch" inherent in the Committee's position (Br. 39).

B. The District Court exercised its balancing function properly in this case.

In light of the abundance of support for the District Court's balancing of the conflicting claims and the significant concessions made by the Committee on this point, all that remains to be determined is whether the District Court balanced properly in this case. A thorough analysis of the Committee's brief, and the absence of legal and factual support for its position, leads to only one demonstrable conclusion: that the District Court properly ruled that the President's immediate interest in faithfully executing the laws and the Judiciary's immediate interest in safeguarding the constitutional right of every individual to a trial free from the probability of prejudicial pretrial publicity outweigh the interest of the Committee in making future laws.

The Committee asserts that "[i]t is possible that many or all the Watergate cases will be resolved by guilty pleas. In such circumstances, any possible prejudice resulting from playing the tapes would be limited or non-existent." (Br. 33). The weakness of the Committee's argument is that it attempts to minimize the inviolability of an individual's Sixth Amendment rights. It relies on possibilities and assumptions that not only ask the Court to derogate the Supreme Court's admonition in the Sheppard case^{6/} but also ignore the actual facts of this case. In this regard it is significant,^{7/}

6/ See discussion at pp. 14-15, supra.

7/ We deem this significant in light of the Committee's assertion that "it is significant that guilty pleas have been obtained" from five other defendants (Br. 33n).

and this Court may take judicial notice, that all seven of the defendants in United States v. John N. Mitchell, et. al., Criminal Case No. 74-110, have pleaded not guilty at arraignment, and have objected to extrajudicial disclosure of matters that might adversely affect their pending trial.^{8/}

That the Committee's position, not only on the law as shown above but also in its application of the facts, is inconsistent cannot be gainsaid. The Committee supports its contention that Sixth Amendment considerations are minimal by asserting that "the tapes may be played in the Impeachment proceedings" (Br. 33-34), yet only three pages later the Committee in attempting to bolster its need to fulfill its informing function states "[t]here is also no certainty that they will be made public during the Impeachment Process." (Br. 37). Once again the Committee relies on contradictory assumptions in an attempt to shore up its specious position.

The Committee further asserts that the tapes may be played "if there are separate trials -- at the first trial of a major White House figure... Any trials following those events would not be effected to any greater degree by production to the Committee of the materials subpoenaed." (Br. 34). This statement ignores the possible prejudicial effect pretrial disclosure would have on the first such trial. It also ignores the District Court's ability

8/ This fact is reflected In Re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, Misc. No. 74-21, p. 2, footnotes 6 and 7.

to schedule separate trials in such a manner as to minimize this effect. Furthermore, and perhaps most damaging to the Committee's earlier effort to minimize the effect of possible prejudicial pretrial publicity, is the Committee's realization, later in its Brief, that "the tapes, for one reason or the other, may not be allowed into evidence." (Br. 37).

The Committee, in stressing the importance of its informing function, continues to invite this Court to sweep aside the holdings of the Supreme Court. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court held that "[t]he exclusion of such evidence in court is rendered meaningless when news media makes it available to the public." 384 U.S. at 360. In Estes v. Texas, 381 U.S. 532 (1965), the Court quoted approvingly from Justice Black's opinion in In Re Murchison, 349 U.S. 133 (1955): "A fair trial in a fair tribunal is a basic requirement of due process... [O]ur system of law has always endeavored to prevent even the probability of unfairness..." 349 U.S. at 543 (emphasis in original).

The Committee's statement that "[m]oreover, no potential Watergate defendant has lodged a complaint in this case that his trial will be prejudiced by release of the tapes" (Br. 34) is an example of the Committee's theorizing in a vacuum completely isolated from reality. To expect an individual who is at the time unindicted to come forward and protest, not only expects too

much, but borders on the ludicrous. In any event, subsequent events have caused the significance attributed to this assertion by the Committee to now weigh heavily against it. Defendants who were not indicted at the time the Committee filed its brief have now come forward and protested.^{9/}

The Committee claims in its Brief that because the President "has allowed many of his aides to testify fully as to the contents of the tapes" that such "action was obviously inconsistent with the claim of prejudicial pretrial publicity." (Br. 11). It should be noted in response that at the time these witnesses testified before the Committee during the spring and summer of 1973 there were no indictments pending or even imminent. This is recognized on June 12, 1973, by Judge Sirica in Application of the United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (1973), where he notes "Counsel for the Special Prosecutor at the hearing represented to the Court that indictments in the matter being investigated by the Select Committee are sure to be forthcoming, although a time cannot be estimated." 361 F. Supp. at 1280. (emphasis added).

Our situation at this time provides a stark contrast since the Special Prosecutor stated on February 6, 1974, that he "expect[ed] that the June 1972 Grand Jury [would] complete its investigation and would return any indictments prior to March 1974." (J.A. 155).

9/ See discussion at footnote 8, supra.

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In any event in the President's letter of July 25, 1973, to the Committee Chairman, the President informed the Chairman that he "must respectfully refuse to produce those recordings." (J. A. 34). In this letter the President informed the Chairman:

I have directed that executive privilege not be invoked with regard to testimony by present and former members of my staff concerning possible criminal conduct. I have waived the attorney-client privilege with regard to my former Counsel.... Executive privilege is being invoked only with regard to documents and recordings... that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President. (J. A. 35) (emphasis added).

In this regard the Committee's argument, inappropriately presented in the statement of the case, that "the supposed confidentiality protected by this claim of executive privilege has been repeatedly breached" (Br. 4) ignores the inherent distinction between tape recordings and oral testimony. Compare Nixon v. Sirica, _____ U. S. App. D. C. _____, 487 F.2d 700, 758-761 (1973) (MacKinnon, J., dissenting). This difference is highlighted by the very existence of this law suit. Moreover the Committee's position overlooks the common congressional practice, in waiving congressional privilege and authorizing oral testimony by congressional staff members in court, but refusing to permit submission of related tangible material. See Nixon v. Sirica, _____ U. S. App. D. C. _____,

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487 F. 2d 700. (Wilkey, J., dissenting), citing United States v. Brewster,
408 U.S. 501 (1972); 118 Cong. Rec. S. 16,766, 92nd Cong. 2d Sess. 487
F. 2d at 772.

The Committee attempts to make much of the fact that the Special Prosecutor took no position in his response to Judge Gesell's request and stated: "We are confident that notwithstanding prior publicity, if jurors are selected with the care required by decisions in this Circuit, all defendants will receive a fair and prompt trial." (J.A. 159) (Br. 31). This is undoubtedly the proper position for the Special Prosecutor, who is charged with the investigation and prosecution of alleged criminal wrongdoing emanating from what is commonly referred to as "Watergate" (Order of Attorney General No. 551-73, November 2, 1973). Thus we cannot be unmindful that at sometime in the future he may be required to argue that very point, in accord with that same position, before this Court. On the other hand some defense attorneys have raised strong objections to extrajudicial disclosure of Grand Jury material including the subpoenaed tapes with equal sincerity.^{10/} Special Prosecutor

10/ See discussion at footnotes 8 & 9, supra.

Cox earlier expressed his concern that there was "the danger that pre-trial publicity will prevent fair trials from ever being held."^{11/} Similarly at the oral argument before this Court on March 21, 1974, concerning the grand jury report Mr. Lacovara of the Special Prosecutor's staff acknowledged that disclosure by the Judiciary Committee of that material might make it impossible for the appealing defendants to have a fair trial and was willing to run the risk that the prosecutions against them might have to be dismissed.

The Committee claims that there is an apparent "basic difference of opinion between Judge Sirica, who has heard four of the five tapes here involved, and Judge Gesell, who has not." (Br. 35). To the contrary, the recent decision^{12/} of Judge Sirica indicates a consistency of approach. His

11/ See June 4, 1973, letter from Special Prosecutor Archibald Cox to Chairman, Select Committee on Presidential Campaign Activities, p. 3. The Committee's denial of the Special Prosecutor's request for the Committee to temporarily postpone its public hearings, indicates that there have been past differences of opinion between the Special Prosecutor and the Committee on what constitutes the "necessary restrictions." This belies to some degree the Committee's assertion of its being "ever cognizant of the need for fair trials." (Br. 32). This difference of opinion is also evidenced in Application of United States Senate Select Committee on Presidential Activities, 361 F. Supp. 1270 (1973).

12/ See Order filed March 18, 1974, In Re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence To the House of Representatives, Misc. No. 74-21 (D. D. C. 1974).

order turning over Grand Jury evidence, including the tapes involved in this case, to the House Judiciary Committee is in accord with Judge Gesell's statement that "[c]ongressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations." (J.A. 168). It should be emphasized that the President did not interpose an objection to this action. Nevertheless, Judge Sirica expressed his concern regarding the probability of prejudicial pretrial publicity when he inquired if the House Judiciary Committee had considered postponing its hearing "until after this so-called cover-up trial has been tried."^{13/} In this regard he stated:

I feel strongly...one of the problems I am going to have in this case is this so-called pre-trial publicity, particularly in this case which I expect to preside over.

The more we can do to give these defendants and every other defendant who might be charged in the future a fair trial, we should all try to do that.

13/ Transcript of Hearing on March 6, 1974 in In Re Reporting and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence To The House of Representatives, Misc. No. 74-21 (D.D.C., 1974) at p. 25.

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Now I am not trying to direct the Committee or... suggest to them anything, but it would seem to me that with the massive publicity this case has had throughout the country and the world that might be a consideration.

In other words, what harm would be done by say waiting until this case is tried... /on/ September 9th...^{14/}

Thus it is obvious that differences between Judge Sirica and Judge Gesell are more imagined than real.

In an obvious last ditch effort to minimize the weight to be given to Sixth Amendment considerations, the Committee asserts "at this time it is impossible to assess the precise impact of such publicity on forthcoming trials." (Br. 34). If this assertion is so, it does not, as the Committee implies, lessen the responsibility for the Court "to take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U. S. 333, 362 (1966). Indeed the Supreme Court has recognized that after a trial the prejudice in denying due process is not always identifiable, and it is beyond peradventure that it is even more difficult to measure future effects. Thus in Estes v. Texas, 381 U.S. 532 (1965), the Supreme Court in setting aside a conviction despite the failure to show any prejudice, stated:

It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. 381 U.S. at 542-543.

14/ Id. at 26.

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Lastly, there is an additional consideration of some import that weighs heavily against the Committee in this case. The public is entitled to know that wrongdoers will be punished and the innocent exonerated. As the Special Prosecutor discerned:

There is much more to this question than whether one or two people go to jail. Confidence in our institutions is at stake. We must find a way both to expose the truth and to punish the wrongdoers. Failure to convict persons in high office shown guilty of crime--even as a consequence of Senate hearings--could well shatter public confidence in our governmental institutions, particularly confidence in our system of justice. At a time when the Nation's concern about crime has focused attention on our system of justice, it would be discriminatory and therefore demoralizing for the powerful to go scot-free while ordinary citizens are sentenced to prison. ^{15 /}

C. The Committee has exceeded its legislative authority under the Constitution.

The power of Congress to conduct investigations is inherent in the legislative process and is broad. Congress cannot legislate wisely or effectively in the absence of information respecting the conditions that the legislation is intended to affect or change. Therefore, the power of inquiry is a necessary and appropriate attribute of the power to legislate. McGrain v. Daugherty, 273 U.S. 135, 175 (1927). However, this power of inquiry is not unlimited. Watkins v. United States, 354 U.S. 178, 187 (1956); United States v. Rumely, 345 U.S. 41, 58 (1953) (Douglas, J., concurring); Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v.

^{15 /} June 4, 1973, letter from Special Prosecutor Archibald Cox to Chairman, Senate Select Committee on Presidential Campaign Activities, p. 3.

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Thompson, 103 U.S. 168 (1880).

The Committee has asserted a broad mandate to get evidence to determine "the extent of malfeasance in the executive branch" (Br. 27). As the predicate for continuing such an inquiry the Committee contends, as it did below, that "revelation of the extent of corruption in the executive branch could help engender public support needed for basic reforms in the electoral system" (Br. 28; again at pp. 9-10 of Plaintiffs' Memorandum on Remand), and that the evidence it seeks is of "vital importance in resolving" the question of "whether perjury has been committed." (Br. 29). This inquiry is not germane to the Committee's legislative purpose, and indeed constitutes a usurpation of those duties exclusively vested in the Executive and the Judiciary. As the court below cogently discerned:

The Committee's role as a 'Grand Inquest' into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. (J.A. 169).

* * *

Clearly the public interest demands that the charges and countercharges engendered be promptly resolved by our established judicial processes. (J.A. 166).

* * *

To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective. (J.A. 168).

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Pursuant to S. Res. 60, 93rd Congress, 1st Sess. (1973), the Committee was established to investigate and study the extent to which illegal, improper, or unethical activities existed in the Presidential election of 1972 and related events, and to "determine whether in its judgment any occurrences . . . revealed . . . indicate the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." (J.A. 11, 12). Thus the Committee's mandate was to identify illegal, improper, or unethical activities and recommend corrective legislation, not to resolve conflicts of evidence and adjudicate questions of guilt or innocence. Such an inquiry is not germane to the Committee's legislative purpose and is outside its charge. Clearly the Committee can honor its legislative mandate without having access to the tapes. ^{16/} As the Supreme Court emphasized in Watkins v. United States, 354 U.S. 178, 187 (1957):

Congress [is not] a law enforcement or trial agency. These are functions of the executive and judicial departments of government.

16/ It should be noted that at least two members of the Committee and the Committee's Chief Counsel have acknowledged that production of the tapes is not essential to the legislative functions of the Committee. The Washington Post of September 10, 1973, p. A2, reported the following statement by Senator Daniel K. Inouye:

"I think we can proceed and file an adequate report without the tapes," said Inouye, a member of the Senate Watergate Committee.

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The Committee asserts that it needs the subpoenaed materials so that it can determine "whether perjury has been committed." (Br. 29).

16/ (Con't)

"As far as I am concerned personally," he said on NBC's "Meet the Press" program, "this is where the difference between a legislative proceeding and a judicial proceeding comes in. If this were a criminal matter, I would say that the tapes are absolutely necessary and essential. But in our case I think we can proceed and file an adequate report without the tapes."

He was asked, "You personally don't care then who is telling the truth?"

"Because it is not our business to decide the guilt or or innocence of any party this is my view." Inouye responded.

Senator Inouye was further asked, "Doesn't it matter to you in your final report whether you established who is telling the truth?"

He responded, "I said this was my personal view and this makes a difference between a legislative investigation and a criminal case. In a criminal case it would be absolutely essential. I would say the tapes be made available. But for the purpose of this committee I am certain the Committee report can be made."

Senator Gurney stated the following views when he was interviewed on Capitol Cloak Room on September 16, 1973:

"Senator, if we can turn to the question of presidential tapes, do you think they are essential to the investigation that the Senate is conducting?"

"SENATOR GURNEY: No. No, I don't. What is our duty anyway? Our duty of course was to charter...", there are certain words unintelligible -- "to look into facts and circumstances of Watergate that the presidential election

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Manifestly, the determination of whether a crime has been committed is outside of the constitutional powers enumerated for the Congress. If the

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of 1972, I should say, and report to the Senate and recommend legislation we thought was necessary in order to improve our political campaigns. Now getting the presidential tapes really has nothing to do with that charter at all. It does have something to do with who said what, on what day the President met with John Dean or somebody else and it really doesn't have anything to do with what our charter is or interfere with our ability to make recommendations to the Senate to improve campaigns.

"MISS STAHL: Well, then you think you can fully write your final report without the tapes, is that correct?

"SENATOR GURNEY: We can, indeed.

"MR. STRASSER: This testimony would relate to what is commonly called the cover-up. Are you saying this is not part of the Committee's jurisdiction?

"SENATOR GURNEY: In answer to the previous question, of course that was did we need the tapes in order to write our report I said no, we didn't. The tapes would shed light on the Watergate affair, that is true, but that is really not what our charter is and that is to write our report and make recommendations to the Senate."

See Transcript at 4-6.

And, at the October 4, 1973, hearing of Plaintiffs' Motion for Summary Judgment before Judge Sirica, the Committee's Chief Counsel, Samuel Dash stated to the Court:

I think that in perfect candor if we didn't get the tapes there is enough information that the Committee has received in which a report, an adequate report might be written in which we could make some legislative recommendations.

Transcript of Proceedings, Senate Select Committee on Presidential Campaign Activities v. Richard M. Nixon, Civil Action No. 1593-73, October 4, 1973, at p. 7.

Committee has received conflicting testimony that it believes may involve perjury, the matter should be referred to the Department of Justice for appropriate legal action under the provisions of the Criminal Code (18 U.S.C. §§ 1621-1623). As aptly stated by the court below:

The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate Committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential for fact finding in the criminal justice system. (J.A. 168).

However, the Committee in appealing to this Court insists upon performing these law enforcement and guilt adjudicating functions itself, activity that clearly exceeds its constitutional authority.

In a similar situation the Supreme Court in Kilbourn v. Thompson, 103 U.S. 168 (1880), determined that the House of Representatives had exceeded its authority in directing one of its committees to investigate the circumstances surrounding the bankruptcy of Jay Cooke and Company, in which the United States had deposited funds. The committee became particularly interested in a private real estate pool that was part of the financial structure and jailed Kilbourn for refusing to answer certain questions about the pool and to produce certain books and papers. The Court found that the subject matter of the inquiry was "in its nature clearly judicial," 103 U.S. at 192, not legislative, and the House was

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exceeding the limits of its own constitutional authority.^{17/} Accordingly, the committee had no lawful authority to require Kilbourn to testify as a witness or produce papers.

It is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the facts needed for intelligent legislative action and all citizens' unremitting obligation to respond to subpoenas. However, this duty adheres only with respect to matters within the province of proper investigation. Watkins v. United States, 354 U.S. 178, 187-188 (1956). In that case the Supreme Court noted that:

We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right[s]

17/ The Court in Kilbourn v. Thompson, observed that:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. 102 U.S. at 190-191.

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Here this Committee is acting in excess of the power conferred on Congress by the Constitution.

The fundamental holding of Kilbourn was not impaired by the subsequent cases of McGrain v. Daugherty, 273 U.S. 263 (1927), Sinclair v. United States, 279 U.S. 263 (1929), and Barenblatt v. United States, 360 U.S. 109 (1959), so heavily relied upon by the Committee. In those cases, the Supreme Court expressly acknowledged the requirement that congressional inquiries be related to a proper legislative purpose. In McGrain, the Supreme Court found that an inquiry into the conduct of the office of the Attorney General reflected legitimate legislative concerns and upheld a subpoena issued to the brother of the former Attorney General. Pointing out that the office of the Attorney General was "subject to regulation by Congressional legislation" and that the "only legitimate object the Senate could have in ordering the investigation was to aid it in legislating," the Court concluded that, in view of the subject matter, it would presume that legislation was the real object of the investigation. 273 U.S. at 178. In Sinclair, the Court found that an inquiry into oil leases was properly related to congressional authority over public lands and rejected, on the basis of the record, the factual argument that the investigation was not in aid of legislation. Similarly, in Barenblatt, the Court noted that Rule XI of the House of Representatives, Eighty-third Congress, had a "'persuasive gloss of legislative history' which shows beyond doubt that in pursuance of its legislative concerns in the domain of 'national security'

the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country." 360 U.S. at 118. The Court in Barenblatt also pointed out the limitations on congressional inquiries:

Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action more particularly . . . the relevant limitations of the Bill of Rights. 360 U.S. at 111-112.

The Supreme Court has quite understandably and wisely sought to avoid the constitutional trauma inherent in a holding that Congress had exceeded its authority. But Kilbourn, and the concept that a legislative purpose is an indispensable prerequisite for a valid inquiry, are the framework in which the Court has found other grounds for declining to enforce congressional subpoenas. Subsequent cases have indicated that the "presumption" indulged by the Court in McGrain may be overcome if the connection with a proper legislative purpose becomes too tenuous. And the Supreme Court has shown particular concern where congressional inquiries have threatened to encroach upon other important constitutional rights. See Watkins v. United States, 354 U.S. 178 (1956); United States v. Rumely, 345 U.S. 41 (1953).

In Rumely where it was argued that the inquiry trespassed upon the First Amendment, the Court said:

Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. 345 U.S. at 46.

The Court went on to hold that questions put to the defendant exceeded the bounds of the resolution by the House of Representatives creating the committee -- notwithstanding the subsequent ratification of the committee's action by the full House.

In Watkins v. United States, 354 U.S. 178 (1957), the Supreme Court affirmed that:

No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. 354 U.S. at 187.

The Court cited Kilbourn for the proposition that an investigation unrelated to legislative purpose would be "beyond the powers conferred upon the Congress in the Constitution" and Rumely for the proposition that "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights." 354 U.S. at 198. The Court held that the House Resolution in question was so broad that the defendant could not fairly determine whether the questions put to him were pertinent to the committee's inquiry.

In this case, as in Rumely and Watkins, there is a collision between the congressional pursuit of information and an important constitutional right. In Rumely and Watkins the Supreme Court was concerned with the impact of congressional investigations upon First Amendment freedoms. Here the investigation directly challenges the constitutional right of every individual to a trial free from the probability of prejudicial pretrial publicity. The Supreme Court has described the right to a fair trial as "the most fundamental of all freedoms" which "must be maintained at all costs." Estes v. Texas, 381 U.S. 532, 540 (1965). Indeed, the court below cogently recognized that:

The President has a constitutional mandate to see that the laws are faithfully executed and should therefore quite properly be concerned with the dangers inherent in excessive pretrial publicity. (J.A. 167).

Watkins is important too for the flat and famous statement in which the Court said: "We have no doubt that there is no congressional power to expose for the sake of exposure." 345 U.S. at 200.^{18/} Of course the Senate is authorized to investigate campaign practices to see if legislation is needed in that area. But the Committee is not the proper forum for making ultimate factual determinations. As the Court below noted:

^{18/} In Watkins the Court also pointed with envy to England, where investigations of this kind are entrusted to royal commissions, removed from the turbulent forces of politics and partisan considerations. "Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents." Nevertheless, they have, as the Court noted, enjoyed "success in fulfilling their fact-finding missions without resort to coercive tactics . . ." 354 U.S. at 191-192.

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Experience and tradition teach that the facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected. (J.A. 169).

Moreover, the Committee asserts that "/i/f Presidential involvement were shown, there might arise a strong mandate for thoroughgoing reforms;" (Br. 28). The Committee's intention, as expressed, is not to fulfill a constitutional duty to legislate or even to inform but implies a duty to arouse public support for future legislation. As discussed more fully at pp. 55-56, infra, this is the antithesis of the legislative process intended by the Framers and found in our Constitution. Manifestly, what the Committee is interested in here is "to expose for the sake of exposure." As aptly stated by the District Judge:

/S/urely the time has come to question whether it is in the public interest for the criminal investigative aspects of /the Committee's/ work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. (J.A. 169).

The Committee can take no comfort in the ruling in Nixon v. Sirica, U.S. App. D.C. _____, 487 F.2d 700 (1973), because a careful reading of that decision reveals that the court emphasized the "narrow contours of the problem" and the fact that the decision was limited to the "precise and entirely unique circumstances of the case." 487 F.2d at 704. Indeed, the exception to the principle of executive privilege carved out there was "made possible by a unique intermeshing of events unlikely soon, if ever,

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to recur." 487 F. 2d at 705. Moreover, this Court has already recognized the great weakness which permeates the Committee's brief on this appeal. The Committee proceeds throughout its brief as though Richard M. Nixon is no different from any other witness whose evidence a Congressional committee would like to have. This is patently wrong when he is President of the United States:

We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. But this is an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege.
487 F. 2d at 715.

In addition, this Court said that: "application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interest that would be served by disclosure in a particular case." 487 F. 2d at 716. No such balancing process is required when a committee is investigating Delaney, Hutcheson, or other private individuals involved in cases on which the Committee relies so heavily (Br. 17-24).

It should also be noted that the Committee does not find itself in a position analogous to that of a grand jury as in Nixon v. Sirica. Obviously, if a grand jury is considering indicting for perjury when contradictory statements were made by different persons, it must ascertain who was not truthful in order to indict the proper person. It could be argued that the grand jury may have been completely precluded

from returning any perjury indictments if it did not have access to the tapes. But the Committee cannot suggest that its primary function -- the proposing of legislation -- is completely precluded because there is some conflict in the testimony given before the Committee. However, the Committee spends considerable space in its brief (Br. 25-26, 28-29) attempting to support its argument that the evidence sought here is vital so that Congress' "informing function" can be accomplished.

It is submitted that the Committee has not been unduly frustrated in carrying out its informing function. The President has permitted many of his closest aides and advisors to give public testimony without claiming privilege. The Committee has had voluminous documents submitted as evidence. There are about 10,000 pages of testimony that have been given under oath. The Special Prosecutor has taken guilty pleas in a number of instances and there are now actual criminal indictments pending trial against a significant number of individuals allegedly arising out of Watergate-related matters. Some of the defendants have, in fact, objected to extrajudicial disclosure of the material in question here. Moreover, all material and evidence relating to the subject matter of this litigation that has been given to the Special Prosecutor for submission to the grand jury, has been given, at the direction of the President, to the appropriate forum, the House Judiciary Committee.

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Thus the only remaining question is whether this material should be turned over a third time, this time to another congressional committee for future legislative and political purposes, when its use might endanger actual criminal defendants' constitutional rights to a fair trial, without serving a vital and pressing legislative need. The doctrine of separation of powers leads us to one compelling conclusion. The judicial branch may not forsake its constitutional responsibility to safeguard the fundamental right to a fair trial in order to grant unnecessary relief, especially where the asserted "informing function" relied upon by the Committee has been adequately fulfilled.

The Committee relies heavily upon Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952), and Hutcheson v. United States, 369 U.S. 599 (1969) (Br. 18). This reliance however, is misplaced. In Delaney, the Court held that the district court's refusal to grant a continuance in the wake of adverse pretrial publicity generated by a congressional committee "seems to us neither right, nor in harmony with the Sixth Amendment." 199 F. 2d at 114.

There are several reasons why that case is inapposite. In Delaney the district court was never asked by the congressional committee to enforce a subpoena nor did it encourage or assist that committee in any way to endanger the constitutional rights of the defendant. Instead, the district court granted two continuances to assure a fair trial but even that was not enough. Here, the Committee invites this Court, as it did below, to become a party to the denial of those same constitutional rights to enable

the Committee to obtain information of dubious value to its legislative purpose.

Unlike Delaney, this case involves a claim of privilege asserted by the President of the United States, pursuant to his Article II mandate, to see "that the laws are faithfully executed." As the court below noted the President should "quite properly be concerned with the dangers inherent in excessive pretrial publicity." (J.A. 167).

In Delaney, a 1952 case, Chief Judge Magruder expressed his concern about the prejudicial effects of adverse pretrial publicity, by acknowledging that, "[P]erhaps the Supreme Court has not spoken its last word upon this vexing subject." 199 F. 2d at 113. Over a decade later the Supreme Court spoke on the subject in the cases of Estes v. Texas, 381 U.S. 532 (1965) and Sheppard v. Maxwell, 384 U.S. 333 (1966). In Sheppard, the court said "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences . . . [T]he trial courts must take strong measures to insure the balance is never weighed against the accused." 384 U.S. at 362 (emphasis added). And in Estes the court emphasized that "[t]he most fundamental of all freedoms is the right to a fair trial." 381 U.S. at 540. It is apparent that in the instant case the District Judge heeded this admonition.

Lastly, it must be noted that the Delaney case stands for judicial recognition that damaging pretrial publicity results from congressional

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investigations undertaken to fulfill the congressional informing function. While a trial court may grant one or numerous continuances in accord with the Delaney decision, to insure the defendant's constitutional right of a trial by an "impartial jury," in doing so it may in effect be depriving the defendant of his constitutionally guaranteed right to a "speedy. . . trial," an issue not addressed by the court in Delaney. The likelihood of depriving a defendant of his right to speedy trial increases when it is governmental action that causes prejudicial pretrial publicity. As the court in Delaney stated:

We perceive no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm. The prosecution is by the "United States of America" against Denis W. Delaney. After the United States has imposed this burden upon the defendant, by making it difficult to determine his guilt or innocence solely on the basis of evidence to be presented at the impending trial, it seems to us neither right, nor in harmony with the spirit of the Sixth Amendment, for the United States to make him stand trial while the damaging effect of all that hostile publicity may reasonably be thought not to have been erased from the public mind.

199 F 2d at 114.

Thus it follows when the government is the cause of the publicity, it is also the "reason for the delay." In discussing the constitutional right to speedy trial, the Supreme Court in Baker v. Wingo, 407 U.S. 514 (1972), lists "reason for delay" as one of the four "factors which courts should assess in determining whether a particular defendant has been deprived of his right." 407 U.S. at 530.

While it is paramount that this Court protect the Sixth Amendment rights of individual defendants, this Court should not be unmindful of the ever present public interest that the innocent be exonerated and the guilty be punished, and that this be accomplished promptly.

Nor can the Committee take comfort in the holding of Hutcheson v. United States, 369 U.S. 599 (1962). There the Supreme Court upheld a contempt citation under 2 U.S.C. § 192, stating that the questions Hutcheson refused to answer were within the proper scope of the Committee's inquiry and that the factual record did not support a conclusion that they were asked to aid in his pending state criminal trial.

In Hutcheson, the petitioner in refusing to answer the questions of the Senate Select Committee on Improper Activities did not invoke the Fifth Amendment privilege against self-incrimination. Instead, he claimed he was being denied due process of law when asked questions relating to a grand jury investigation, a subject concerning the grounds for his indictment. Hutcheson is clearly distinguishable from the present case because there the Supreme Court did not have to weigh the committee's legislative need against the witness' constitutional right to a fair trial. There was nothing to weigh. The committee was acting in a constitutionally proper manner and when the witness waived his privilege against self-incrimination he also surrendered his claim that he was being denied due process of law.

It should also be noted that Justice Brennan, in his concurring opinion, which supported the majority decision of three Justices,^{19/} sounded a warning when he said:

Any thought that some of our recent decisions, e.g. Barenblatt v. United States, 360 U.S. 109; Wilkinson v. United States, 365 U.S. 399; Braden v. United States, 365 U.S. 431, weakened the vitality of our holding in Watkins v. United States, 354, U.S. 178, 187, that the congressional power of inquiry is not an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress, is dispelled by today's strong expression of continued adherence to that vital principle . . . 369 U.S. at 624.

He further noted that the courts:

will give the closest scrutiny to assure that indeed a legislative purpose was being pursued and that the inquiry was not aimed at aiding the criminal prosecution. Even within the realm of relevant inquiry, there may be situations in which fundamental fairness would demand postponement of inquiry until after an immediately pending trial... 369 U.S. at 625 (emphasis added).

Subsequent cases clearly demonstrate that the Court has not hesitated to intervene to protect a citizen's constitutional rights when endangered by congressional action. In Powell v. McCormack, 395 U.S. 486 (1968), the Court stated that an individual's claim of a constitutional right:

19/ Justice Black and Justice Frankfurter took no part in the decision of the case. Justice White took no part in the consideration or decision of the case and Chief Justice Warren was joined by Justice Douglas in dissent.

falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of the respect due [a] coordinate (branch) of government, Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. 395 U.S. at 548-549.

Also, in Davis v. Ichord, 141 U.S. App. D.C. 183, 442 F.2d 1207 (1970), the House Committee on Un-American Activities relied on Hutcheson v. United States and Barenblatt v. United States to support its contention that the separation of powers doctrine precluded a court from interfering with a congressional investigation in aid of legislation. This Court, citing Powell v. McCormack, dismissed the contention stating:

This judicial admonition /that one branch of government may not lightly interfere with another was/ enunciated in cases which involved only part of the spectrum of the judiciary's responsibility in relation to Congress, /and/ must be read with decisions of the Supreme Court where individual rights were alleged to be infringed by Congress in circumstances which required constitutional adjudication. 141 U.S. App. D.C. at 188, 442 F.2d at 1213. In accord, Hentoff v. Ichord, 318 F. Supp. 1175 (1970).

Thus, the clear case law supports the judgment of the court below in refusing to enforce the Committee's subpoena, which threatens to jeopardize the inviolability of an individual's constitutional guarantee "to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend., VI. This Court can do no less.

II. The District Court properly ruled that the Committee failed to meet the burden of proof sufficient to obtain a summary judgment for the relief it sought and properly dismissed the case.

A. The order of the District Court should not be reversed unless it was clearly erroneous.

It is the contention of the Committee that this Court should reverse the District Court's judgment below if it finds that judgment "erroneous" even though it is "not arbitrary or capricious. Broadview Chemical Corp. v. Loctite Corp., 417 F. 2d 998, 1000 (2d Cir. 1969), cert. denied, 397 U.S. 1064 (1970)." (Br. 9). The Committee also noted that "[i]n any event, . . . [the District Court's] conclusion . . . is, without 'substantial evidentiary support' and must leave this Court with the definite and firm conviction that a mistake has been committed, and . . . constitutes a clear abuse of discretion. See Case v. Morrisette, 155 U.S. App. D.C. 31, 475 F. 2d 1300, 1306-08 (1973)." (Br. 9).

The District Court found that the Committee "has not established by a preponderance of the evidence" that its subpoena should be enforced (J.A. 169). Since the conclusion of the District Court was based on a weighing of the evidence and of the inferences drawn from documents and undisputed facts, review here is subject to the "clearly erroneous" standard of Civil Rule 52(a). Indeed the Committee itself recognizes this by its citation (Br. 9) of Case v. Morrisette, 155 U.S. App. D.C. 31, 475 F. 2d 1300, 1306-1308 (1973), in which this Court thoroughly and correctly discusses the application of the "clearly erroneous" standard. This Court has consistently held that:

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To be sure, the findings are presumptively correct and the burden of persuading us that they are "clearly erroneous" rests upon [appellant]. Equally certain it is that we are not to weigh the evidence de novo, or disturb the findings simply because we might have reached a contrary result on the same evidence.

And not only must we give 'due regard...to the opportunity of the trial court to judge of the credibility of the witnesses,' but we must also measure the findings by the 'clearly erroneous' test even when they are based on inferences drawn from documents or undisputed facts. (emphasis added) (footnotes omitted) (omission in original). Case v. Morissette, 155 U.S. App. D.C. 31, 38, 475 F. 2d 1300, 1307 (1973).

Judge Robinson's learned analysis in Case v. Morissette, supra, is fully supported by controlling authorities. See also United States v. United States Gypsum Co., 333 U.S. 364, 394 (1947); United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); C.I.R. v. Duberstein, 363 U.S. 278, 291 (1960); Zenith Radio Corp. v. Hazeltine, 395 U.S. 100, 123 (1969); Jackson v. United States, 122 U.S. App. D.C. 324, 327, 353 F. 2d 862, 865 (1965). For a good discussion of this issue, see Lundgren v. Freeman, 307 F. 2d 104, 113 (9th Cir. 1962). The Case decision involved an action for a declaratory judgment and a mandatory injunction, like the case at bar, "on facts not materially in dispute."^{20/} 155 U.S. App. D.C. at 34, 475 F. 2d at 1303. There, this Court in applying the clearly erroneous test, 155 U.S. App. D.C. at 43, 475 F. 2d at 1312, found that "on the entire evidence, 'we are left with the definite and firm conviction that a mistake has been committed...'"

20/ See footnote 5, supra.

155 U.S. App. D.C. at 46, 475 F. 2d at 1315. The Committee is required to meet this same standard in the instant case if it is to succeed in overturning the order of the District Court.

This Court is not free to reverse merely because it might, in the first instance, have weighed the facts differently nor on any theory that seven heads are better than one. See Hughes Tool Co. v. Varel Mfg. Co., 336 F. 2d 61, 62 (5th Cir. 1964). As the Supreme Court has said:

It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent, because our mandate is not to set aside findings of fact "unless clearly erroneous." United States v. National Assn. of Real Estate Boards, 339 U.S. 495, 495-496 (1950). See also Hadco Products, Inc. v. Frank Dini Co., 401 F. 2d 462, 464 (3d Cir. 1968).

It cannot be contended -- and the Committee does not argue -- that the decision below comes within the rule that "conclusions of law do not find shelter in the 'clearly erroneous' requirement" Case v. Morrisette, 155 U.S. App. D.C. 31, 38, 475 F. 2d 1300, 1308 (1973). When, as here, the decision of the trial court results from "the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts," the "clearly erroneous" standard is controlling C.I.R. v. Duberstein, 363 U.S. 278, 289 (1960). See also Lundgren v. Freeman, 307 F. 2d 104, 115 (9th Cir. 1962); Note, 49 Va. L. Rev. 506, 531 (1963).

The Committee's reliance on Broadview Chemical Corp. v. Loctite Corp., 417 F. 2d 998 (2d Cir. 1969), cert. denied, 397 U.S. 104 (1970) (Br. 9), is not relevant to this Court's review, since the court below entertained the Committee's action for a declaratory judgment. In Broadview, the trial court was overruled because it failed to entertain such action. 417 F. 2d at 1001. Here the District Court considered and resolved the issue of justiciability in the Committee's favor and then decided against the Committee on the merits (J.A. 165). Thus based on the well established case law this Court should affirm the decision below, as the Committee recognizes, unless it finds it "clearly erroneous."

B. The Committee has not met its burden of establishing that the District Court's decision was "clearly erroneous" and, in fact, the evidence indicates it was clearly correct in dismissing the Committee's suit.

The Committee has certainly failed to demonstrate that the District Court's decision was "clearly erroneous." The undisputed evidence, on the contrary, supports the clear correctness of that decision. In reviewing the District Court's decision, this Court should focus primarily upon whether the Court below correctly balanced the risks of harm to individuals from the probability of prejudicial pretrial publicity against the interest of the Committee in making future laws. It should be noted that even the Committee seems to recognize that it must meet the burden of showing "a demonstrable, pressing legislative need for the evidence subpoenaed" (Br. 1-2) as part of

the balancing test. Thus while the District Court must balance the factual inferences, the proper decision depends on both (1) whether there is "a demonstrable, pressing legislative need" and (2) how immediate and concrete is the probable danger to fair trials. Unless the Committee can show that their "pressing need" is such as to clearly outweigh any probability of "danger" to an individual's Sixth Amendment rights, then it has not established that the District Court's balancing was "clearly erroneous." The Committee's brief on appeal suggests that the Committee believes its "pressing need" is self-evident. We cannot agree. From the undisputed evidence and the lack of support to be found in the Committee's brief, it is manifest that the Committee has clearly failed to meet its burden on both points.

In the Committee's brief it is asserted that "[w]here wrongdoing in the highest executive offices has possibly occurred, it is vital that Congress be able to consider intelligently the need for corrective legislation to prevent its reoccurrence" (Br. 25). Later in its brief the Committee cites the language of McGrain v. Daugherty, 273 U.S. 135 (1927), and Watkins v. United States, 354 U.S. 168 (1957), to support its contention of the importance of the informing function of Congress and of the necessity of information for the legislative process (Br. 25-26). Of course we agree

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that legislation drafted without knowledge is bad legislation. It is, however, absurd to assert that the information sought on the tapes is of the type necessary to draft corrective legislation.

Mr. H. R. Haldeman, Mr. John D. Ehrlichman, and Mr. John W. Dean, III have testified as to the substance of the material on the tapes. In this regard, it is also appropriate to quote from the President's July 23, 1973, letter to Chairman Sam J. Ervin of the Committee:

If release of the tapes would settle the central questions at issue in the Watergate inquiries, then their disclosure might serve a substantial public interest that would have to be weighed very heavily against the negatives of disclosure.

The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. (J.A. 40).

The only possible additional type of information the tapes could provide relates to guilt or innocence and to the credibility of witnesses, if they could provide that. This type of information is unnecessary to the Committee's immediate legislative task.^{21/} Rather, it goes to the key

21/ See footnote 16, supra.

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judicial task of determining guilt or innocence and of deciding whether, in fact, a person has committed a crime such as perjury.^{22/}

The Constitution precludes Congress from usurping judicial functions. For example, under Article I, Section 9, it may not pass bills of attainder. The only arguable area where a proper congressional need for the kind of information relating to guilt or innocence is present in an impeachment proceeding. And, of course, this is the very area where the President has turned over all the material in question to the proper forum, the House Judiciary Committee. As noted by the District Judge, "Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations..." (J.A. 168).

The most important point to be noted is that where the material in question has been requested for proper governmental functions -- the judicial determination of criminal conduct or the removal of executive officers via impeachment for grave crimes -- the President has submitted

22/ It should again be remembered that the prosecution of perjury, whether before a court or a congressional committee, is a judicial, not legislative function. While the Committee has talked of the need to protect the integrity of its processes (Br. 29), when this results in punishing individuals it is a judicial task. Indeed the indictment in United States v. John N. Mitchell, et. al., Criminal Case No. 74-110 (D.D.C. 1974), includes counts alleging perjury before the Committee. Thus the Committee's asserted need for information to protect the integrity of its processes is completely lacking in merit.

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it to the appropriate forums, the Special Prosecutor and the House Judiciary Committee. On the other hand, the Committee has yet to show "a demonstrable, pressing need" or, in fact, any persuasive need.

It has also been alleged by the Committee that in drafting corrective campaign legislation it must know whether the President was guilty of the alleged act in question (Br. 27-28; again at p. 6 of Reply to Defendant's Response to Plaintiffs' Memorandum on Remand). This information, according to the Committee, is necessary to determine the nature of the proposed legislation. This argument misconceives the nature of the legislative process and hence the concept of legislative need. To suggest that in order to draft a law you must know if it has been broken defies logic! As former Chief Justice Warren, joined by Justice Douglas, stated in dissent in Hutcheson v. United States:

Not only would it be contrary to the holding in Kilbourn to conclude otherwise, but it is incomprehensible to me how it can be urged that Congress needed the details of how petitioner committed this alleged crime in order to pass general legislation... Hutcheson v. United States, 369 U.S. 599, 636 (1962).

In order to prohibit an act it is not necessary to know whether an individual has, in fact, done the act. Rather we ask whether the action in question is of a kind that should be prohibited. In applying this principle, the Committee's legislative task is simple: to draft general standards, not to

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find specific instances of guilt. This last function the Constitution has delegated to the Judicial Branch. As emphasized by Chief Justice Warren, speaking for the majority, in Quinn v. United States, 349 U.S. U.S. 155, 161 (1955):

Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.

The Committee's real concern and sole responsibility is, in the words of Senate Resolution 60 of the 93rd Congress, which established the Committee (J.A. 12),

to determine whether in its judgment any occurrence which may be revealed by the investigation and study indicate the necessity or desirability of enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen.

Upon this task the Committee has gathered thousands of pages of testimony, heard from dozens of witnesses, (it should be noted that wherever executive privilege or the lawyer-client privilege was applicable to these witnesses it was waived by the President so that the Committee might fully perform its legislative task) (J.A. 35-36) and conducted its investigation for over a year. At this stage of the Committee's business the legal and legislative issues involved deal largely with public policy questions and principles. For example, should campaigns be publicly financed or should a President

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be limited to one term? These questions relate to general principles and deeply held values, not specific cases of individual conduct.

It is hardly reasonable to argue, as the Committee did below (p. 6 of Reply to Defendant's Response to Plaintiffs' Memorandum on Remand), and apparently still does (Br. 27-28), that legislative limitations on Presidential participation in the electoral campaign or Presidential tenure in office depend for their adoption or rejection on the alleged misdeeds of any particular President. Legislative need cannot be founded on such spurious grounds. As has been noted by the Supreme Court:

Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. Watkins v. United States, 354 U.S. 178, 187 (1956) (emphasis added).

Another contention of the Committee is that the tapes sought are needed to engender public support for the "needed" reforms in campaign legislation (Br. 28). It should be noted that this argument does a great disservice to the Congress and to the American people. It implies that Congress will not act unless it is emotionally stirred up by disclosures of alleged wrongdoing. The Framers thought that the merits of a proposal were what should gain its support. They designed an elaborate system for

screening out the enthusiasms of the moment and built into the Constitution procedures causing legislation to be considered several times before becoming law, so that ill-conceived proposals would be less likely to become bad laws. U.S. Const., Arts. I, II. The whole suggestion of using information relating to potential wrongdoing as a legislative catalyst, in this regard, militates against the very essence of constitutional government and due process of law. It certainly cannot be relied upon to support a contention of legislative need. Rather, it argues for the political significance of the tapes, not their legislative usefulness. A look at the language of the Committee's brief leaves no doubt about the political, not the legislative, significance of the tapes:

Moreover, revelation of the extent of corruption in the executive branch could help engender the public support needed for basic reform in our electoral system. If Presidential involvement were shown, there might arise a strong public mandate for thorough going reforms; if no Presidential involvement were revealed, the public and the Congress might be satisfied that lesser measures were adequate... (Br. 28) (emphasis added).

Thus it seems clear that the Committee has not significantly shown that it has, in its own words, "a demonstrable, pressing legislative need." However, even if the Committee had made such a showing the District Court's decision is not only not "clearly erroneous," but clearly correct in view of the countervailing constitutional interests it was protecting.

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The District Judge was certainly speaking to the most basic values of our constitutional system when he noted:

The President, the Congress and the Courts each have a mutual and concurrent obligation to preserve the integrity of the criminal trials arising out of Watergate. (J.A. 166).

* * *

The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration. (J.A. 168).

* * *

To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective in this matter. All of the evidence at hand is to the contrary. (J.A. 168) (emphasis added).

The District Court upon weighing the implications of the undisputed facts opted for the critical value of the right to a fair trial over the speculative need for the tapes. This result can hardly be called a "clearly erroneous" reading of the facts.

Further, the language of the District Court has been reinforced by subsequent developments. First, there are now actual criminal indictments pending trial against a significant number of individuals, allegedly arising out of Watergate-related actions.^{23/} Second, some of these defendants have, in fact, already objected to extrajudicial disclosure of the material in question here. This fact highlights the prescience of the District Judge in properly weighing the danger of prejudicial pretrial publicity to the constitutional rights of the then only potential criminal defendants. And third, this very same material has been turned over to the House Judiciary Committee, the only appropriate committee of Congress for inquiring into specific allegations of crime against individuals within the executive branch of government. The disclosure of the tapes thus now poses an even more immediate concrete danger of causing prejudicial pretrial publicity to the rights of actual, not potential, criminal defendants. The complete lack of justification for extrajudicial disclosure is now even more pronounced.

In light of these later considerations the District Court's balancing of interests, which was correct on the facts then before the Court, would

23/ At the time the Committee filed its brief its assertion that "no potential Watergate defendant has lodged a complaint in this case that his trial will be prejudiced by release of the tapes" (Br. 34), while factually correct was disingenuous. For at that time there were no indictments, thus no interested defendants. Now, however, this is not true (emphasis added).

today be even more so. The Committee has certainly not met its burden of showing that the District Court's decision is "clearly erroneous."

III. The Committee may not properly request relief from this Court that was not sought from the District Court.

In Part III of its brief (Br. 36-39) the Committee for the first time in this litigation puts forward, as an alternative to the full disclosure it asks for in the earlier portion of the brief, a request that the tapes be turned over to it subject to a protective order that would prevent public disclosure of what is in the tapes. Thus it now asks for the first time for relief that it did not request from the District Court contrary to the well-established rule of appeal and error that a reviewing court "will not undertake to review what the court below did not decide." Walters v. City of St. Louis, 347 U.S. 231, 233 (1954). Appellate tribunals have frequently held that "ordinarily an appellate court does not give consideration to issues not raised below." Hormel v. Helvering, 312 U.S. 552, 556 (1941).

This rule has been consistently recognized in this Circuit, Brown v. Rudberg, 84 U.S. App. D.C. 221, 222, 171 F. 2d 831, 832 (1948); Keyes v. Madsen, 86 U.S. App. D.C. 24, 26, 179 F. 2d 40, 42 (1949), cert. denied 339 U.S. 928 (1950); American Air Export & Import Co. v. O'Neill, 95 U.S. App. D.C. 274, 276, 221 F. 2d 829, 831 (1954); Hardy v. Northwestern Federal

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Savings & Loan Assoc., et al., 102 U.S. App. D.C. 371, 372, 254 F. 2d 70, 71 (1957); Stouper v. Jones, 109 U.S. App. D.C. 106, 109, 284 F. 2d 240, 243 (1960); Calhoun v. Freeman, 114 U.S. App. D.C. 385, 387, 316 F. 2d 386, 388 (1963); Dart Drug Corp. v. Parke, Davis & Co., 120 U.S. App. D.C. 79, 89, 344 F. 2d 173, 183 (1965). The holding of this Court, speaking through then-Judge Burger in Osin v. Johnson, 100 U.S. App. D.C. 230, 235, 243 F. 2d 653, 658 (1957), is pertinent to the instant case: "[i]t is not the function of this court to resolve whether the facts warrant the imposition of a constructive trust since appellant failed to point out the possibility of such a course to the District Court. . . ." Here that teaching may be stated with equal force since it is not the function of this Court to resolve whether the facts warrant the issuance of a protective order when such relief was not requested from the District Court.

This rule is particularly applicable in the case at bar where the new relief is inconsistent with the relief sought in the District Court. This patent inconsistency is highlighted by the public disclosure rationale upon which the Committee so greatly relied to support its argument in the lower Court. Until the Committee filed its brief with this Court it never expressed a willingness to accept the evidence subject to a protective order or a willingness to waive "separation of powers considerations"

(Br. 37). That the Committee's present request is not only inconsistent with but contrary to the relief sought below is particularly highlighted by the Committee's statement in a footnote on page 4 of its "Plaintiffs' Observations on the President's Letter and the Special Prosecutor's Memorandum" filed on February 7, 1974, a day prior to the District Court's ruling. Here the Committee gratuitiously told the District Court: "[w]e see no reason for the Court to impose restraints as to how such material may be used - a course that, in any event, would be of doubtful validity in view of separation of powers and comity considerations. . . ."

Furthermore, the Committee's argument to the District Court relied heavily on the need to make the contents of the tape public.^{24/} Thus the Committee should not now be heard in this forum seeking this relief. It would be a novelty in our jurisprudence -- and hardly a desirable one -- if a District Court were to be reversed for failure to give plaintiffs a relief that they never sought in that court and that is inconsistent with the arguments they presented for the relief they did seek.

24/ Thus at p. 21 of the Plaintiffs' Memorandum on Remand the Committee told the District Court that "revelation of the extent of the corruption in the executive branch would help engender the public support needed for basic reforms in our electoral system." Again at p. 22 of that document the Committee said: "Public revelation of all Watergate facts is also needed to deter repetition in the future of wrongdoing by governmental officials." In the footnote at p. 22, and again in the footnote at p. 8 of Reply the Committee laments the possibility "that evidence submitted to the Special Prosecutor will never become public." Other expressions of the supposed importance of making this material public as a part of the Committee's "informing function" appear at pp. 10, 16, and 20 of Plaintiffs' Memorandum on Remand and at p. 7 of the Reply.

While this Court may rely on a new ground to affirm the decision of the District Court in this case, it may not rely on new grounds to reverse. For "[i]t is a familiar rule of appeal and error that decisions may be upheld on a ground acceptable to the appellate court (but not relied on by the trial court) even though the ground of the trial court is rejected. Except in the manifest error cases, it is the rule that an appellant cannot stand on a new ground found first in the appeal." C.I.R. v. Belridge Oil Co., 267 F. 2d 291, 295 (9th Cir. 1959); Continental Can Co. v. Horton, 250 F. 2d 637, 645 (8th Cir. 1957).

In the case at bar the Committee was not in any way precluded from seeking in the District Court the relief it now requests. The Committee could have done so in its original pleadings, or in amended pleadings, but for some reason it elected not to do so. Even after it received an adverse ruling in the District Court it could have filed a motion in that court to alter or modify the judgment pursuant to Civil Rule 59(e), but it once again elected not to do so. Moreover the Committee's case was dismissed by the District Court without prejudice.

It is interesting to note however that the Committee seeks to circumvent the well-established rule of law on this point by attempting to characterize the relief it now seeks as a "modification" (Br. 36). The District Court stated: "the Select Committee has not established by a preponderance

of the evidence that it is entitled at this particular time to an injunction directing the President to comply with its subpoena for the five tape recordings. The application of the President's counsel for dismissal of the complaint is granted and the complaint is dismissed without prejudice." (J.A. 169-170). The District Court's order is straightforward and unequivocal. Thus, despite the Committee's assertion, only a superficial glance is needed to determine that the relief sought is not merely a technical modification, but actually a substantive reversal of the District Court's order. The word "modify" has been judicially construed. "[It] means to alter; to change in incidental or subordinate features;..." Smith v. Ray, 140 Ohio St. 394, 398, 79 N.E. 2d 116, 118 (1948). In Best Foods v. United States, 158 F. Supp. 583, 589 (1957), the court in discussing the verb "modify" noted "[I]t is pertinent also, that it connotes, not a major change, but an alteration only in the thing modified." The words of this Court in State Airlines v. Civil Aeronautics Board, 84 U.S. App. D.C. 374, 378, 174 F. 2d 510, 514-515 (1949) are particularly germane to this case:

We do not agree with the Board and with Piedmont that...the routes...are a mere modification. Such a claim seems to us to be a distortion of reality and a totally unreasonable capricious, and arbitrary interpretation of the word "modification." To be sure, the word "modification" normally connotes change or altering, but such a change or altering must not be

great and must not result in so transforming the original thing to be modified as to make of it something entirely new and different in substance. Volume VI of The Oxford English Dictionary (1933 Edition) defines "modification" as "the action of limiting, qualifying, or 'toning down' (a statement, etc.); a limitation, restriction, or qualification." In Linn v. Linn, 7242 Ala. 688, 8 So. 2d 187, 188 (1942), the Supreme Court of Alabama said: "Modify ordinarily is not used in a sense of completely setting aside the thing to be modified, but to limit, qualify as moderate." (emphasis added).

In any event whether the relief sought by the Committee is incorrectly denominated as a "modification," or correctly characterized as a "reversal," the Committee is not entitled to seek it now in this forum.

While the Committee cannot seek new relief because of insurmountable procedural barriers, courts have on occasion looked to the merits of such claims in order to affirm the lower court. Affirming the District Court in Dart Drug Corp. v. Parke, Davis & Co., supra, this Court, speaking through Judge McGowan, stated:

Parke, Davis urges upon us with some force that Dart should not be allowed to have it both ways, that is to say, to present its case on one theory to the District Court and then, through new counsel, to seek reversal by taking a new tack before us. We agree that a decent respect for the principle of orderliness in litigation, quite apart from the deference due a District Judge who labored mightily to guide counsel away from the pitfalls of his own position, should make us slow to find reversible

error by reason of new and different contentions made here for the first time. But caution is not the same as immobility where justice is involved, and we are confident we have the unreserved concurrence of the District Judge in turning to an examination on their merits of the points which counsel now says should have been made before. 120 U.S. App. D.C. at 89, 344 F. 2d at 183.

Judge Bazelon in American Air Export & Import Co. v. O'Neill, supra, stated, "since this contention was not urged below, we need not consider it here. But it is without merit in any event." 95 U.S. App. D.C. at 276, 221 F. 2d at 831 (footnote omitted).

This rule of law taken in conjunction with the principles enumerated in C.I.R. v. Belridge Oil Co., 267 F. 2d 291, 295 (9th Cir. 1959), and Continental Can Co. v. Horton, 250 F. 2d 637, 645 (8th Cir. 1957) is particularly pertinent to the instant case. Here new material facts reinforcing the District Court's order have occurred subsequent to that order, thus supplying this Court with additional grounds for affirmance.

These new facts are as follows. First, there are actual criminal defendants whose rights may be adversely affected by the probability of prejudicial pretrial publicity.^{25/} Second, counsel for numerous defendants have voiced serious objections to disclosure of information, including the

^{25/} United States v. John N. Mitchell et al., Criminal Case No. 74-110 (D. D. C. 1974), is presently scheduled for trial on September 9, 1974.

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subject matter of this case, beyond the confines of grand jury proceedings.^{26/} Third, all material and evidence relating to the subject matter of this litigation that has been given to the Special Prosecutor for submission to the grand jury has been turned over, at the direction of the President, to the appropriate forum, the House Judiciary Committee. In light of these recent occurrences, this Court has additional factual grounds for affirming the District Court's order.

The Committee's new proposal and its statement in its brief "that the order would limit access to the tapes to a severely limited number of persons and would prohibit public revelation of their contents. . ." (Br. 37) is a triumph of hope over experience. The history of the Committee's inability to prevent "news leaks" belies its assertion of future confidentiality.^{27/} Furthermore this claim viewed in light of several significant facts contradicts the Committee's position. First, the Committee is scheduled to go out of existence on May 28, 1974, and thus plans to make a full public disclosure

26/ See footnote 8, supra.

27/ See, for example, the statement of Senator Ervin: "I notice in recent months leaks have come out of... every Congressional Committee of both Houses of Congress. It is a most deplorable state and very unjust to people who have become victims of these leaks." Hearings before the Select Committee on Presidential Campaign Activities of the United States Senate, 93rd Cong., 1st Sess., bk. 10, at 3904.

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on or before that date.^{28/} The Committee in its "Motion For Reconsideration of Date Set For Oral Argument" filed on March 11, 1974, represented to this Court "/It is highly unlikely that the Committee will seek further extension of this date or that the Senate would approve an extension."^{29/} Second, criminal prosecutions are scheduled for trial after the Committee's expiration date,^{30/} and, clearly, the Committee cannot fulfill its stated desire to inform the public without possibly prejudicing the constitutional rights of numerous defendants.

28/ See for example, statement of Committee's Chief Counsel, Samuel Dash: "The investigation...will be completed shortly and then the Committee will review and release publicly the information we gathered and the relevant portion of the executive session testimony. There will be no concealment of any relevant things." Washington Post, February 20, 1974, p. A11, Col. 1.

29/ This representation weakens the Committee's argument, for if in fact this need were so justified the Committee would not hesitate to seek an extension of its expiration date, nor would the full Senate be reluctant to concur. This is particularly evidenced by the obvious fact that it is extremely unlikely that there can be a final adjudication by the Supreme Court before the Committee's expiration date, which the Committee well knew on March 11, 1974 when it filed its motion.

30/ See footnote 25, supra.

Moreover, there is a probability that the contents of the tapes will eventually be made public.^{31/} There is an additional substantial ground to support this belief in light of the receipt of the material by the House Judiciary Committee. Thus the validity of the Committee's argument in this regard is considerably diminished, if it is not in fact completely destroyed.

As shown above this pressing need as a practical matter is less than compelling. In addition, even if the Committee were successful in maintaining the confidentiality of the tapes, any report written by the Committee with access to information disclosed on the tapes, but without actual disclosure of the tapes, would result in inferences and conclusions that may or may not be justified by the actual facts. It would be impossible to read the report without knowing what the Committee thinks the tapes showed about the credibility of witnesses who appeared before it. Thus, the potential unfairness to many individuals, including the defendants in various criminal prosecutions, is manifest.

The Committee's claim that "[t]his procedure should satisfy the lower Court's only concern -- that the tapes would be played 'in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings'" (Br. 38)

^{31/} The Special Prosecutor intends that such tapes will be used as evidence in future trials (J.A. 156, 160).

conveniently ignores the fact that its present request would produce additional concerns for the lower court. The District Court could have expressed these concerns if the Committee's request had been presented to it. One such concern would be the details and provisions of the requested protective order. Perhaps an even more overriding concern would be the actions to be taken by the District Court in the event there was a breach of its protective order. At a minimum the Court could address the question of accountability. But in the unlikely event that a leak could be discovered,^{32/} whether the court could hold a Senator or an employee of the legislative branch in contempt for violating provisions of its protective order raises an additional question of serious magnitude.

Gravel v. United States, 408 U.S. 606 (1972).

Thus while the Committee asserts that "this procedure should satisfy the lower Court's only concern" (Br. 38) regarding the relief sought below, this new procedure would necessarily create other concerns and increase the probability for "needless friction" for the court with a coordinate branch (see Sanders v. McClellan, 150 U.S. App. D.C. 58, 63, 463 F.2d 894, 900 (1972); Ansara v. Eastland, 143 U.S. App. D.C. 29, 31,

32/ See, for example, the statement of the Committee's Chief Counsel Mr. Samuel Dash: "We have had a problem like this before and I think we all know that the problem of leaks is one that cannot always be solved." Hearings before the Select Committee on Presidential Campaign Activities of the United States Senate, 93rd Cong., 1st Sess., bk. 10 at 3903.

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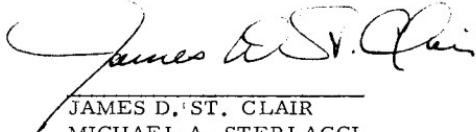
442 F.2d 751, 753 (1971)) in the event the order which the Committee is now seeking were breached.

Thus since this contention was not urged below, this Court need not consider it here. "But it is without merit in any event." American Air Export & Import Co. v. O'Neil, 95 U.S. App. D. C. 274, 276, 221 F.2d 829, 831 (1954).

Conclusion

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,



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James D. St. Clair

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

APR 1 1974

CLERK OF THE UNITED
STATES COURT OF APPEALS

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, suing in its)
own name and in the name of the)
UNITED STATES,)

and)

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,)
HERMAN E. TALMADGE, DANIEL K. INOUE,)
JOSEPH M. MONTOYA, EDWARD J. GURNEY,)
and LOWELL P. WEICKER, JR., as United)
States Senators who are members of the)
Senate Select Committee on Presidential)
Campaign Activities)

NO. 74-1258

Appellants)

v.)

RICHARD M. NIXON, Individually and as)
President of the United States)

Appellee)

REPLY BRIEF OF APPELLANTS

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April 1, 1974

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
suing in its own name and in the name of)
the UNITED STATES,)
and)
SAM J. ERVIN, JR., HOWARD H. BAKER, JR.)
HERMAN L. TALMADGE, DANIEL K. INOUYE,)
JOSEPH M. MONTOYA, EDWARD J. GURNEY,)
and LOWELL P. WEICKER, JR., as United States)
Senators who are members of the Senate Select) No. 74-1258
Committee on Presidential Campaign Activities.)
Appellants)
v.)
RICHARD M. NIXON, Individually and as President)
of the United States)
Appellee)

REPLY BRIEF OF APPELLANTS

Several significant events have transpired since appellants filed their initial brief that have radically changed the context in which this appeal must be decided.

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On March, 1, 1974, the Watergate grand jury, in addition to issuing indictments, filed a document entitled Report and Recommendation and accompanying materials with the United States District Court for the District of Columbia. As described by Judge Sirica, this document "strongly recommends" that the accompanying materials, which deal with the President's involvement in the matters the grand jury had been investigating, be forwarded to the Committee on the Judiciary of the House of Representatives for its Impeachment inquiry. Because the five tapes sought in the present litigation were submitted to the grand jury, it is presumed that relevant portions of those tapes were included in the accompanying materials filed with the District Court.

On March 18, 1974, the District Court, over the objections of the seven persons named in the Watergate indictment who claimed their trials would be prejudiced, ordered the materials forwarded to the House Judiciary Committee. It is significant that this action was taken with the express urging of the Special

* / See File Opinion (p.1) in In Re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence To the House of Representatives, (D.D.C., Misc. No. 74-21, Mar. 18, 1974)

**/ See Amicus Curiae Brief of the Special Prosecutor, pp. 2-3.

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Prosecutor and without objection by the President. The District Court imposed no restriction on the use of these materials by the House Judiciary Committee.

This Court, on March 21, 1974, upheld the District Court's action. Haldeman v. Sirica (C.A.D.C. Nos. 74-1364, 74-1368, March 21, 1974). The Court, in discounting the possibility of future prejudice to the seven defendants, took particular note of the Special Prosecutor's belief and Judge Sirica's conclusion that fair trials would not be interfered with by transmittal of the materials to the House. No interested party sought review of this Court's ruling in the Supreme Court and the House now has the materials involved.

Moreover, the President has independently forwarded all the materials supplied the Special Prosecutor (including the five tapes here considered) to the House Committee. The President raised no claim of executive privilege to prevent disclosure of these materials to the House. Neither did he assert that their release would prejudice the trials of the Watergate defendants.

*/ Also, the tape of the February 28 conversation between the President and John Dean (which we seek) has been released to the defendants in the Mitchell/Stans trial in the Southern District of New York and a partial transcript of this conversation has been publicly used by the attorney for Mr. Stans in his cross examination of Mr. Dean. See Washington Star-News, March 22, 1974, p. A-9; New York Times, March 27, 1974, pp. 1, 26.

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In view of these developments, we are unable to perceive any acceptable argument, based either on the need for fair trials or the doctrine of executive privilege, that would prevent production of the five tapes at issue to the Select Committee. The Special Prosecutor, the District Court and this Court have concluded that the release of the tapes to the House will not endanger fair trials even though there are no Court-imposed restrictions on the use of the tapes by the House and the likelihood is that they will be publicly played. In such circumstance, how can release of the material to the Select Committee be said to create any danger of additional prejudice, especially since the Committee is willing to receive the tapes under a stringent protective order if this Court concludes that the Committee's challenges to the District Court's ruling are not sustainable? Certainly the Select Committee cannot be relegated to a position inferior to that of the House Judiciary Committee by the application of different and stricter standards respecting the danger of pretrial publicity. Important as is the task of the House Committee in the Impeachment process, it is clearly no more important than the task given the Select Committee by a unanimous Senate in S. Res. 60 to conduct a "complete investigation and study" (JA 13) into the Watergate affair to enable Congress to devise remedies to safeguard the integrity of the

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electoral process -- the cornerstone of our democratic system of government.

Furthermore, because the President did not object to the release of the grand jury materials to the House Committee and in fact has voluntarily given the five tapes to that body, any claim that the confidentiality of these tapes should be protected by application of the doctrine of executive privilege would be utterly untenable. This Court's observation in Nixon v. Sirica, ____ U.S. App. D.C. ____, 487 F.2d 700, 718 (1973) that "the simple fact is that the conversations are no longer confidential" now applies with added force. Perhaps in recognition of this point, the President in his Brief has effectively relinquished his argument that the tapes should be denied the Committee because of the need to protect the confidentiality of presidential communications and thus preserve the "effectiveness of the executive decision-making process" -- the sole rationale that supports the doctrine of executive privilege.

See Nixon v. Sirica, supra, 487 F.2d at 717.

* / It is somewhat perplexing that the Attorney General in his unexpected Brief For The United States As Amicus Curiae contends that the interest in protecting the confidentiality of presidential communications justifies affirmance of the District Court's ruling although the President has effectively dropped his claims based on the requirements of confidentiality. It is also intriguing to note that the Attorney General, while a Senator, failed to vote against S. Res. 194, which was passed by a unanimous Senate and which unequivocally supports the Select Committee's present lawsuit. See Cong. Record, S 2012-3, Nov. 7, 1973. In any event, his argument has no validity, especially in view of recent events.

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It is also noteworthy that the President makes only passing mention of his claim that this case is not justiciable. (Br 4-5) His reluctance to argue this issue is not surprising for the District Court's determination that the case is justiciable was clearly mandated by this Court's opinion in Nixon v. Sirica, as ^{*/} the District Court recognized.

The President's Brief is essentially a defense of the District Court's ruling that it could subjugate a recognized and demonstrable legislative need to its own public policy view of the need to prevent the possible prejudicial effect of pretrial publicity on potential criminal trials. To this and related issues we now turn.

*/ The District Court declared:

"The President at the outset contends that the issue before the Court 'constitutes a non-justiciable political question,' but the decision of the United States Court of Appeals for the District of Columbia sitting en banc in Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989, 487 F.2d 700 (D.C. Cir. Oct. 12, 1973), is squarely to the contrary and no extended discussion is required. The reasoning of that Court involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee. Baker v. Carr, 369 U.S. 186 (1962), establishes the tests for determining the existence of a 'political question,' and application of these tests leaves no doubt that the issues presented in the instant controversy are justiciable. See id. at 217. See also Powell v. McCormack, 395 U.S. 486, 518-50 (1969)."

Appellants briefed the justiciability issue thoroughly below. See, e.g., Plaintiffs' Memorandum On Remand, pp. 12-18; Reply To Defendant's Response To Plaintiffs' Memorandum On Remand, pp. 2-5.

I. The New Rule Of Law Propounded By The District Court Is Not Sustainable

Because of the misconceptions of our arguments found in appellee's Brief, it appears necessary to state again the precise basis of our challenge to the lower Court's ruling.

That ruling, as previously observed, was not based on the doctrine of executive privilege. To the contrary, the Court specifically held that its ruling did not rest on the need for presidential confidentiality, the only interest protected by the privilege. See JA 166; Nixon v. Sirica, supra, 487 F.2d at 717. Rather, the Court's ruling was based on a conclusion that, despite its finding that there was no legal bar to enforcing the subpoena, it could, nevertheless, substitute its policy judgment for the wisdom of Congress and overrule a legislative determination of need because of the Court's own view of the possible prejudicial effect on potential criminal trials of releasing the tape recordings at issue. It is this asserted new rule of law that appellants challenge. If the lower Court has applied an incorrect legal standard, this Court must reverse. */

*/ "Conclusions of law do not find shelter in the 'clearly erroneous' requirement". Case v. Morrisette, U.S. App. D.C. _____, 475 F.2d 1300, 1308 (1973).

We believe the authorities we have cited firmly establish that a Court, in ruling on the validity of a Congressional subpoena, may not substitute its judgment for the legislature's as to whether public policy demands that the subpoena be enforced. See Brief of Appellants, pp. 15-23. To make this assertion is not to contend, as appellee suggests (e.g., Br. 6), that the Courts must become a "rubber stamp" for Congress. A Court in an action to enforce a Congressional subpoena has many issues to resolve. It must decide that the Court has jurisdiction and that the case is justiciable. It must determine whether plaintiffs have standing to bring their action. It must determine whether plaintiffs have the power under the Constitution and their authorizing resolution to seek the material in question and to initiate suit. It must decide whether the information sought is pertinent to plaintiffs' inquiry. Finally, it must determine whether the material requested is protected by a valid claim of privilege. All these matters were considered by the Court below and resolved in plaintiffs' favor. The lower Court's role in this case, therefore, was hardly that of a "rubber stamp". Moreover, we do not suggest that the lower Court become a "rubber stamp", but only urge that it be required

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to follow respected legal principles concerning the enforcement of Congressional subpoenas.

However, once the Court has made the legal determinations just outlined, it does not have the authority to weigh its view of public policy against the legislature's in determining whether a subpoena should be enforced. A Court's responsibility is "not to pass judgment upon the general wisdom or efficacy of the activities of /a/ committee in a vexing and complicated field". Barenblatt v. United States, 360 U.S. 109, 125 (1959). "/I/t does not lie with /a/ Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes". Hutcheson v. United States, 369 U.S. 599, 618-19 (1962). "The courts have no authority to speak or act upon the conduct of the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded." Barsky v. United States, 83 U.S. App. D.C. 127, 136, 167 F.2d 241, 250 (1947) cert. denied, 334 U.S. 843 (1948). See also Dennis v. United States, 84 U.S. App. D.C. 31, 33, 171 F.2d 986, 988 (1948).

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The fact that a Court, in passing on a claim of executive privilege, may weigh legislative requirements against "the public interest protected by the privilege"--that is, the need for "confidentiality of conversations that take place in the President's performance of his official duties . . . to protect the effectiveness of the executive decision-making process"--does not mean that the Court has license to balance other public policy considerations against legislative need. The executive privilege determination is sui generis and the balancing test there required to protect executive confidentiality does not allow a Court, which rejects a claim of executive privilege, to weigh other public policy considerations against a recognized legislative need. */ Certainly nothing in Nixon v. Sirica authorizes the balancing of any public policy considerations other than the need for executive confidentiality against legislative requirements and, in fact, the Supreme Court's ruling in Hutcheson v. United States, supra, is a flat holding that a claim that due process rights in a criminal proceeding will be violated by the production of information to Congress does not excuse such production.

*/ Appellants' advocacy of "balancing" in the Court below was always in the executive privilege context and thus is not inconsistent with the position they now take. We present below strong policy reasons why the District Court's balancing test is not desirable.

Hutcheson presented a much stronger case than the present one for denying information to a Congressional committee on the grounds that fair trials might be endangered because there the claim was raised by an actual defendant in a criminal trial who had been specifically asked questions concerning the subject matter of his indictment. Moreover, Hutcheson had been convicted of contempt of Congress and his liberty was at stake. Nevertheless, the Supreme Court rejected the contention that Congress should not be allowed to enlist the aid of the Courts to convict him of contempt for failing to give testimony relating to the matter under indictment. The case is thus a straightforward affirmation of the right of Congress to receive information relevant to existing criminal proceedings even if pretrial publicity might result. It is controlling here. */

*/ This Court has on several recent occasions cited Hutcheson with approval. See, e.g., United States Servicemen's Fund v. Eastland, ____ U.S. App. D.C. ____, 488 F. 2d 1252 (1973); Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F. 2d 894 (1972). The claim (Br 43) that Hutcheson was decided the way it was because the witness, by waiving his claim against self-incrimination, also surrendered any argument that he was being denied due process of law constitutes both a total misreading of that case and a misstatement of existing law; surely one who chooses not to assert his Fifth Amendment privilege has the right to due process of law. The present case hardly presents a proper situation for a retreat from Hutcheson because the President's claim of prejudice is derivative and the possibility of additional prejudice if the tapes are released to the Select Committee is highly speculative.

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Appellee attempts to justify the District Court's decision by asserting that Courts have a well-recognized discretion to preserve the integrity of criminal trials. While that is true as a general statement, there is no authority indicating that the Courts may deny evidence to a Congressional committee to further that goal. Indeed, the precedent we have cited such as Hutcheson is to the contrary. Also particularly relevant are the provisions of the local rules of the United States District Court for the District of Columbia respecting Free Press--Fair Trial. Local Rule 1-27 authorizes the District Court to prescribe stringent "gag" rules to protect fair trials but contains a significant exception. Rule 1-27(6) states that "Nothing in this Rule is intended... to preclude the holding of hearings or the lawful issuance of reports by legislative... bodies". This is but another recognition of the principle announced in Hutcheson that "a congressional committee which is engaged in legitimate investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding... or when crime or wrongdoing is disclosed". 369 U.S. at 618. It is significant that Judge Sirica's "gag" order in United States v. Mitchell, Crim. No. 74-110, March 1, 1974,

(the Watergate case) specifically referenced the exception found in Rule 1-27. Moreover, Judge Gesell's "Special Order" of February 23, 1974, in United States v. Chapin, Crim. No. 990-73, commanded that Rule 1-27 be strictly enforced, with certain exceptions not relevant here.

Finally, we note again that there are strong policy reasons that militate against the shackling of a legislative committee investigating criminal conduct by a rule of law that would prohibit it from achieving information that might also be relevant to some criminal trial. As Watkins v. United States, 354 U.S. 178 (1957), emphasizes, a Congressional committee performs one of its highest duties when it investigates corruption in the executive branch. To allow the executive or a criminal defendant to thwart such investigations by the claim that criminal trials might be prejudiced would be intolerable. Such a rule would present clear potential for abuse for the executive could always assert that the matters under legislative investigation were or would be the subject of criminal proceedings.

If the Watergate experience teaches anything, it is the need for strong, vigorous Congressional oversight of the executive--without this oversight function, the existence of the

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very tapes at issue here might not have been revealed. This oversight function should not be hindered by the establishment of unwarranted obstacles to the investigation by Congress of criminal matters. In fact, the imposition of restrictions such as the one established by the District Court is contrary to the historical right of Congress to explore criminal conduct which is discussed below.

There are now sufficient privileges in the law--most notably the privilege against self-incrimination--to protect the rights of those asked to give evidence to a Congressional body. See Hutcheson v. United States, supra. Moreover, the Courts have various devices such as careful voir dire to guard against prejudiced jurors. */ This Court should not condone a new rule of law that would give a new privilege to those seeking to avoid producing evidence to Congress and thus seriously debilitate the effectiveness of Congressional investigations into criminal conduct.

*/ In the executive privilege determination one of two competing interests must completely give way--either the confidentiality of an executive communication is lost or the legislature is denied the evidence it seeks. However, if the Committee receives the information it requests in this case, this does not mean that fair trials might be forever lost for the Courts have many devices to insure that fair trials will be achieved. Thus no balancing test between the needs of the Congress and the requirements of fair trials is required here even though, in the executive privilege context, a balancing test is appropriate.

II. If A Balancing Test Is Proper, The Balance Must Be Struck For Congress, Particularly In View Of Recent Events.

Appellants' initial brief demonstrates that, on the undisputed facts before the lower Court when it rendered decision, its conclusion that the need to protect fair trials outweighed Congressional need for the evidence concerned was in error. Events that have occurred since the lower Court ruled leave no doubt that the balance must be struck for Congress.

A. The Danger To Fair Trials Is Minimal.

As observed, the District Court on March 18, 1974, over the objections of the seven Watergate defendants, ruled that the grand jury materials should be transmitted to the House Judiciary Committee. No restrictions were placed by the Court on the use to be made of these materials by the House.

This Court, on March 21, 1974, upheld the District Court. Certain portions of its opinion are highly pertinent for present purposes:

"We note, as did also the District Judge, that, if the disclosures to the public so feared by petitioners do in fact take place and have the consequences that petitioners predict, they will be free at trial to raise these claims in the light of what has actually happened, and to seek the traditional relief ranging from continuance through change of venue to dismissal of their indictments. It appears to

be premature at the least to make their speculations about future prejudice the basis for present employment of our extraordinary writ power. With respect to the substance of those speculations, we cannot be unaware of the fact that the Special Prosecutor has concluded that his interests in successful prosecutions can be reconciled with this transmittal for consideration in the impeachment process--thereby suggesting that the dangers in his estimation are not great. The District Judge who received the indictment, perused the materials accompanying the report, and expressed his general interest in the fairness of the trial over which he will preside later this year, also concluded that it is unlikely that this transmittal will interfere with a fair trial." File Opinion p. 3.

This statement is in accord with the District Court's conclusion in that case that "considerations of possible adverse publicity are both premature and speculative." File opinion p. 21.

The grand jury materials have now been delivered to the House. Moreover, before that delivery, the President voluntarily submitted to the House all materials previously given the Special Prosecutor, including the five tapes at issue. The President, at that time, made no protestation that turning over these tapes would prejudice the fair trials of Watergate defendants. Similarly, he raised no contention that release of the grand jury materials to the House would endanger fair trials. His claim to that effect in this case is thus both inconsistent with his previous positions and unpersuasive.

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The fact of the matter is that release to the House of the grand jury materials and the materials given the Special Prosecutor by appellee presents a far greater danger to potential trials than does production of the five tapes to the Select Committee. The Select Committee seeks only five tapes whose contents have already been the topic of immense publicity. The material now in possession of the House includes not only these five tapes, but fourteen more tapes and hundreds of documents. In view of what already has been produced, the Select Committee's requests are paltry.

Furthermore, the Select Committee has now decided not to hold further public hearings (a decision not reached when the lower Court ruled) and release of the tapes to it would in all probability not result in their public playing, although, unless restrained by a protective order, the Committee would use the contents of the five tapes to prepare its final report.* / However, the House Committee, where the attention of the nation is now riveted, may well play these and other tapes in public sessions that may be televised. Surely the impact on further trials of such an event would be a hundred-fold greater than use of the five tapes by the Select Committee in its final report. But this Court has concluded that the danger of pretrial publicity respecting

* / The Committee plans to issue its report on May 28, 1974, over three months before the Watergate trial is scheduled to begin. The pretrial impact, if any, of a written report would thus probably be dissipated by trial time.

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release of the grand jury materials to the House was not sufficient to prevent that transmittal. We fail to see how this Court, in view of that determination, can conclude the contrary in this case where the danger of prejudicial publicity is manifestly less substantial. At the risk of repetition , we note again that the five tapes at issue are now held by the House and it is difficult to conceive how additional prejudice can result from their release to the Select Committee.

Before leaving this subject, it is appropriate to comment briefly on the observations in the Amicus Brief filed by the Special Prosecutor. The position of the Special Prosecutor is basically the one he took in the Court below. See JA 154-160. The essence of the Special Prosecutor's views is his conclusion that:

"We are confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this circuit, all defendants will receive a fair and prompt trial."

Accordingly, the Special Prosecutor takes no position as to whether the Court should consider the possibility of pretrial publicity a decisive factor in its determination respecting the enforceability of the Committee's subpoenas. */

*/ The views of the Special Prosecutor regarding the Watergate trials must be given far greater weight than those of the Attorney General who has no responsibility for those prosecutions.

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The Special Prosecutor's conclusions, however, must be read in light of his actions in the grand jury materials matter. As the lower Court there noted, the Special Prosecutor "urged" that the materials be submitted to the House. Furthermore, as this Court remarked in sustaining the lower Court's ruling in that case (p. 3):

". . . We cannot be unaware of the fact that the Special Prosecutor has concluded that his interests in successful prosecutions can be reconciled with this transmittal for consideration in the impeachment process--thereby suggesting that the dangers in his estimation are not great." */

The Special Prosecutor in his Amicus Brief attempts to explain the apparent difference in his positions in that case and here by reference to the different Constitutional responsibilities to be performed by the House Committee and the Select Committee. We contend elsewhere that the Select Committee's responsibility to recommend legislation that will safeguard the electoral process for future generations is of the highest order and is second to none. But the point to be made here is that, from the perspective

*/ Appellee fails to inform the Court that the statement at p. 34 of our initial brief that "/ a /t this time it is impossible to assess the precise impact of such publicity on forthcoming trials" was first made by the Special Prosecutor. See appellee's Brief at 25.

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of the possibility of pretrial publicity, release of the five tapes to the Committee poses no greater danger than, or additional danger to, that existing from release of those and other materials to the House. In fact, as undisputedly demonstrated above, the dangers are far less pronounced than those accompanying the release of the various materials to the House.

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B. Appellants Are Fulfilling Valid Legislative Purposes And Have A Pressing Need For The Material In Question

1. Appellants Have Not Exceeded Their Legislative Authority Under The Constitution

Appellee, while recognizing (Br 26) that "the power of Congress to conduct investigations is inherent in the legislative process and is broad," nevertheless persists in his contention that the Select Committee exceeds its legislative authority because it is usurping the authority of the judiciary and attempting to adjudicate guilt or innocence (e.g., Br 27-28). These untenable contentions were made to the Court below and rejected.

The Congress, since the beginning of the nation, has investigated wrongdoing and maladministration by executive officials under its Constitutional power to determine the need for new legislation and fulfill an associated informing function. Congress is not ousted of investigatory power simply because the executive conduct under scrutiny may be criminal and assertions to the contrary have been repeatedly rejected by the Supreme Court.

In relevant respects the case at bar is a virtual duplicate of McGrain v. Daugherty, 273 U.S. 135 (1927). There the Supreme Court broadly sustained a Senate inquiry into alleged malfeasance

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and nonfeasance by Attorney General Daugherty in connection with the Teapot Dome scandal. The investigation was resisted on grounds essentially identical to those now asserted by appellee.

It was claimed that:

"The investigation is not legislative, but judicial in its character; it is an attempt to prosecute, try, and determine the guilt or innocence of Harry M. Daugherty. Congress has no such power except in impeachment proceedings." ^{*/}

This assertion was flatly rejected by the Supreme Court, which ruled that:

(1) "IT the power of inquiry--with process to enforce it -- is an essential and appropriate auxiliary to the legislative function." 273 U.S. at 174.

(2) The Attorney General's administration of the Justice Department was "Iplainly I a subject/ on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." 273 U.S. at 177. ^{**/}

^{*/} Argument for appellee, 71 L. Ed. 581. McGrain arose out of the issuance by the investigating committee of subpoenas to Mally S. Daugherty, the Attorney General's brother, to explore Mally Daugherty's possible involvement in his brother's alleged wrongdoing. On Mally Daugherty's failure to comply with the subpoenas he was seized by the Senate Sergeant-at-Arms. He then, by way of habeas corpus, challenged the validity of his detention and, with it, the Senate's investigation. The Supreme Court upheld the validity of the investigation and detention.

^{**/} In response to the argument that the true motive behind the investigation was not to consider the need for new legislation but to pillory the Attorney General, the Court asserted that a presumption should be indulged that "the real object of such an investigation was to aid Congress in its legislative function." 273 U.S. at 178. For later affirmations of this presumption, see Barenblatt v. United States, 360 U.S. 109, 133 (1959); Watkins v. United States, 354 U.S. 178, 200 (1967).

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(3) It was not "a valid objection to the investigation that it might possibly disclose crime or wrongdoing" by the Attorney General. 273 U.S. at 180.

What the Supreme Court said in McGrain regarding a legislative investigation is controlling here where the Congress, with a view to corrective legislation, is investigating alleged wrongdoing by high executive officials. For another Teapot Dome case in the same vein, see Sinclair v. United States, 279 U.S. 263 (1929).

The teaching of McGrain and Sinclair have been reaffirmed by more recent decisions that have repeatedly sustained Congress' power to investigate unlawful conduct in connection with its legislative responsibilities. Hutcheson v. United States, 369 U.S. 599 (1962) (Senate Select Committee on Improper Activities in the Labor or Management Field; investigation of unlawful use of union funds to influence prosecution); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952) (House Ways and Means Subcommittee on Administration of the Internal Revenue Laws; Investigation of Corruption by Collector of Internal Revenue); United States v. Costello, 198 F.2d 200 (2d Cir. 1952), cert. denied, 344 U.S. 874 (1952) (Senate Special Committee to Investigate Organized Crime in Interstate Commerce); United States v. Orman, 207 F.2d 148 (3rd Cir. 1953) (same); Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F.2d 894 (1972) (Senate Government Operations

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Permanent Subcommittee on Investigations; investigation of
riots and violent disorders). */

This consistent precedent is controlling here. Moreover, it is clear from a policy standpoint that criminal conduct is a legitimate subject of legislative concern because the existence of such conduct may well necessitate remedial legislation. **/ The bald assertion by appellee (Br 58) that the House Judiciary Committee is "the only appropriate committee of Congress for inquiring into specific allegations of crime against individuals within the executive branch of government" is thus unacceptable. See further Watkins v. United States, 354 U.S. 178 (1957).

*/ The very existence of the "use immunity" statute for compelled testimony before Congress, which the District Court construed in In Re: Application of United States Select Committee on Presidential Campaign Activities, 261 F. Supp. 1270 (D.D.C. 1973), recognizes that Congressional investigations may deal with conduct which may also be the subject of criminal prosecution. The District Court's decision in that proceeding appears to assume the validity of the Select Committee's investigation into criminal conduct.

**/ The present case is wholly unlike Kilbourn v. Thompson, 103 U.S. 168 (1881), where the Court found that the subject of inquiry--the conduct of a particular real estate pool subject to pending bankruptcy proceedings -- could not lead to valid legislation. Appellee suggests that the holding in Kilbourn has not been "impaired". (Br 33) For a contrary view see Justice Harlan's opinion in the Hutcheson case, 369 U.S. at 613-14, where he states that Kilbourn has been "severely discredited" because of its "loose language."

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We know of no case holding that a Congressional investigation into criminal conduct must cease once the conduct has been merely "identified" (see appellee's Brief at 28), and we are confident there is none because such a ruling would debilitate Congressional investigations. In fact, Hutcheson v. United States, 369 U.S. at 619, teaches that it is not the function of a Court "to say when a Congressional committee should be deemed to have acquired sufficient information for its legislative purposes."^{*/} It is significant that Section 1 (a) of S. Res. 60 instructs the Committee "to conduct an investigation and study of the extent . . . to which illegal, improper, or unethical activities" occurred in the 1972 presidential campaign and election. JA 11 (emphasis added). And Section 2 of S. Res. 60 later admonishes the Committee that its investigations should be "complete." JA 130^{**/}

^{*/} In McGrain v. Daugherty, supra, the Supreme Court sustained a Congressional investigation upon the determination that the administration of the Justice Department was a proper subject for legislation. It did not consider it necessary to engage in a minute examination of the evidence sought by the subpoena in question, which had been issued to the Attorney General's brother, to ascertain whether obtaining this evidence was critical for the enactment of legislation.

^{**/} The lower Court's view (JA 169) that the Watergate facts should only be developed in judicial proceedings cannot go unchallenged. As recently said in Silverthorne v. United States, 400 F.2d 627, 633-34 (9th Cir. 1968) cert denied, 400 U.S. 1022 (1971):

"The Senate Committee and the federal grand jury are associates in exposing criminal activity and moving toward its curtailment."

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Were there any doubt that the Committee has been and is acting with valid legislative purpose in subpoenaing and suing the President, it has been removed by the Senate through S. Res.

194. Section 3 of this Resolution states:

"The select committee and its members, by issuing subpoenas to the President and instituting and pursuing litigation to achieve compliance with those subpoenas, were and are acting to determine the extent of possible illegal, improper, or unethical conduct in connection with the Presidential campaign and election of 1972 by officers or employees of the executive branch of the United States Government or other persons. It is the sense of the Senate that, in so doing, the select committee and its members were and are engaged in the furtherance of valid legislative purposes, to wit, a determination of the need for and scope of corrective legislation to safeguard the processes by which the President of the United States is elected and, in that connection, the informing of the public of the extent of illegal, improper, or unethical activities that occurred in connection with the Presidential campaign and election of 1972 and the involvement of officers or employees of the executive branch or others therein. It is further the sense of the Senate that the materials sought by the committee's subpoenas are of vital importance in determining the extent of such involvement and in determining the need for and scope of corrective legislation."

In view of this statement of approbation by the unanimous Senate, it is exceedingly difficult for appellee to assert that the Committee proceeds without valid legislative purpose. It is even more difficult for him to overcome the presumption (referenced above) that a legislative committee acts with legitimate purpose.

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Finally, it is misleading to suggest, as appellee does (Br 28), that the lower Court found that the Committee exceeds its legitimate legislative function by seeking the tapes in question. To the contrary, the Court specifically held that "the tapes are relevant to the Committee's functions." JA 164. The lower Court did conclude, erroneously we believe, that the Committee has no "pressing need" for the tapes in question, and to this finding we now turn.

2. The Committee Has A Vital Need For The Material At Issue.

The focus of the nation is now on the Impeachment inquiry and the Watergate criminal proceedings. While these proceedings are of extreme importance to the nation, their existence should not obscure the fact that the Select Committee also has equally crucial constitutional tasks to perform that were mandated by a unanimous Senate.

The Select Committee is the only body specifically charged with devising legislation to rectify the abuses that occurred in the 1972 presidential campaign and election. The House Committee has no such responsibility and, in fact, its concern is narrower than the Select Committee's. The House Committee only examines the fitness of the President to remain in office. The Select Committee, on the other hand, must deal with possible

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abuses not only by the President but also by other high government officials, and must recommend legislative standards that will prevent malfeasance in the future. This responsibility is clearly of the highest Constitutional order.

Although the Committee as a whole has not yet considered or expressed itself on legislative recommendations, there are certain possible recommendations that may turn on the determination whether the President or his closest associates were involved in criminal conduct in the 1972 campaign. In such circumstances, it is possible that the Committee might consider a recommendation to limit presidential tenure to one term with restrictions on the President's participation in the campaign to choose his successor, or might proffer a drastic campaign finance bill severely curtailing the contribution of private monies. It is possible that the Committee might consider suggesting the establishment of a permanent special prosecutor, immune from presidential removal, to prosecute election-related offenses. This special prosecutor might, by legislation, be given automatic access to all campaign records and executive materials relating to the campaign. The Committee might also recommend the establishment of a Federal Elections Commission that would have authority to investigate and restrain misuse of governmental

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authority by the incumbent administration in election campaigns. Or the Committee might undertake a review of certain federal criminal laws such as those concerning obstruction of justice, misprison of felony, and conspiracy to defraud the United States to ascertain whether they are adequate to deal with campaign conduct by executive officials.*/

We could expand on these examples but perceive no need to do so. For the point is that, in the words of McGrain v. Daugherty, 273 U.S. at 177, presidential elections are "/p / plainly /a subject / on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." And, as the Supreme Court said in Hutcheson v. United States, 369 U.S. at 617:

"If these suspicions / as to the involvement of the President and his associates in wrongdoing / were founded, they would . . . support / t / remedial federal legislation."

* / To posit these legislative possibilities in no way implies that they will, in fact, be the recommendations of the Select Committee. Because the Committee has legislative goals in mind, it plainly does not seek the tapes in question simply "to expose for the sake of exposure". See Appellee's Brief 36-7; Watkins v. United States, 354 U.S. 178, 200 (1957). In any event, it is clear from Watkins that exposure for the sake of exposure is only condemned where private affairs are involved; it is in fact the duty of Congress to expose governmental corruption even if it has no legislation immediately in mind. See 354 U.S. at 200.

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See further Shelton v. United States, 131 U.S. App. D.C. 315, 319-21, 404 F. 2d 1292, 1296-98 (1968) cert. denied, 393 U.S. 1024 (1969).^{*/} The lower Court, of course, specifically found that the materials sought were "relevant" to the exercise of the Committee's functions.

Legislation such as suggested above is drastic legislation. It should not be undertaken unless the Congress and the public are convinced that the abuses are great enough to warrant it. For example, the appointment of a permanent Special Prosecutor would divest the President of his traditional powers to control the administration of justice--a step that should not be taken unless the abuse is great enough to warrant it.^{**/}

*/ See also Barsky v. United States, 83 U.S. App. D.C. 127, 167 F. 2d 241, 245 (1948) cert. denied 334 U.S. 843 (1948) where this Court remarked that "the power of inquiry by the legislature is coextensive with the power of legislation and is not limited to the scope of the content of contemplated legislation." The appellee's statements (Br. 21, 39, 54) that he has fully allowed his staff to testify before the Select Committee without invoking executive privilege and thus supplied sufficient information to the Committee are in error. Numerous Administration personnel, since the President's initial waiver of executive privilege, have in fact invoked that privilege before this Committee.

**/ For the proposition that there is no need to know specific abuses in order to pass general legislation, appellee, at p. 53, cites Justice Warren's dissent in Hutcheson which contains a view not adopted by the majority in that case. See, e.g., 369 U.S. at 617.

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Furthermore, needed legislation will not pass unless it has the popular support that will be produced by a revelation of the exact conditions that must be remedied. The President suggests (Br 37, 55-56) that it is somehow improper to inform the public to gain their support for needed legislation. To the contrary, ours is a government of and by the people and it is fundamental that the populace governs best when fully informed. It is the essence of democracy to advise the people of governmental corruption so they can urge their elected representatives to enact remedial legislation.

It is not merely the plaintiff Committee that has concluded that the evidence sought is vital to Congress. By the adoption of S. Res. 194, the entire Senate has unanimously endorsed the Committee's efforts to obtain this evidence. That Resolution states that the Senate "approves and ratifies the committee's issuance" of the subpoena here involved, and also "approves and ratifies" the Committee's institution of this litigation to achieve compliance with this subpoena. The Resolution further provides that:

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". . . It is further the sense of the Senate that the materials sought by the committee's subpoenas are of vital importance . . . in determining the need for and scope of corrective legislation." */

In addition, the entire Congress has enacted Public Law 93-190 empowering the Committee to maintain and the Courts to

*/ Senator Ervin, in his affidavit to the District Court, (attached to the Supplemental Memorandum In Support Of Plaintiff's Motion For Summary Judgment) has also described the evidence sought by the subpoena as "vital to the exercise of the Committee's functions." See para. (2). The formal statement of the Committee's urgent need for the materials subpoenaed contained in S. Res. 194 is entitled to greater weight than the off-the-cuff remarks attributed to Senators Inouye and Gurney found in the Brief of Appellee at pp. 28-30. Both those Senators are appellants here and fully support this appeal. Moreover, the remarks of Chief Counsel Dash found in Appellees' Brief at p. 30 are taken out of context. Immediately after making the statement appellee quotes, Mr. Dash observed that "the Senate / is / calling upon the Committee to investigate fully all the facts in this case and come up not with an adequate report, but with the best possible report with the best possible legislative recommendations for reform so these things will never happen again . . . Obviously, we are not out of business if we don't get the tapes, but obviously it is essential that we get the tapes to do the job that the unanimous Senate called upon the Committee to do. And I think there is a distinction between an adequate report and a really full report that safeguards the electoral process for the country." See the October 4, 1973, Transcript of Proceedings in this case at p. 7.

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entertain litigation to enforce the subpoena previously issued by "said Committee to the President." Under the circumstances, the statute represents a Congressional recognition of the public importance of the materials sought; it is, moreover, certainly arguable that a Congress that did not support the Committee's efforts to achieve the materials subpoenaed would not have passed a statute that aids it in doing so.*/

It is surprising that the President's Brief does not even mention S. Res. 194 in discussing the Committee's need for the material involved. The lower Court's opinion suffers from the same flaw. And neither the Brief nor the opinion deals with the relevance of P. L. 93-190 to the issue of the Committee's legislative need. But, we submit, in assessing the public interests in disclosure, these actions by the elected representatives of the people are entitled to great deference. Whatever legitimate interest the executive may have in withholding information must inevitably shrink in the face of such action, for "where the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . ."

* / The Senate, of course, is supportive, as demonstrated by S. Res. 194.

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Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579,

637 (1952) (Jackson, J., concurring).

This Court, therefore, should conclude that the Committee does have significant need for the materials in question and that the Committee's need outweighs any interest in avoiding pretrial publicity, especially now that the tapes at issue have been released to the House and likely will be made public some time before the Watergate trial begins.

III. If The Court Finds Appellants' Challenges To The Lower Court's Opinions Not Sustainable, Appellants Will Accept A Protective Order That Will Guard Against Pretrial Publicity; This Court Has Authority To Rule On The Appropriateness Of A Protective Order

Appellants believe the District Court should be reversed outright, particularly in view of the crucial events that have transpired since its ruling was entered. If the Court disagrees, appellants will voluntarily submit to a protective order that will prevent undue pretrial publicity yet at the same time ensure that appellants' legislative missions can be accomplished. Such a protective order, which surely can be formulated and administered without undue difficulty, should remove all the concerns expressed below by the District Judge.

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The President's argument that this Court may not consider the appropriateness of a protective order is unpersuasive for several reasons. First, the issue was raised in the District Court. The Special Prosecutor, in his memorandum to the District Court, made the following suggestion:

"If the Court holds that the Senate Select Committee subpoena is valid and enforceable, it might be appropriate for the Court to consider imposing reasonable conditions on the use of the recordings or securing voluntary assurance that such restraint will be observed." JA 157.

In response, the Select Committee represented to the District Court that it would "voluntarily" impose "the necessary restrictions" upon itself to ensure that future trials would not be prejudiced, but suggested to the court that, because self-restraint ^{* /} would be shown, a protective order was unnecessary. The District Court, apparently rejecting the protective order suggestion, dismissed the Committee's complaint without prejudice.

* / See Plaintiffs' Observations on the President's Letter And The Special Prosecutor's Memorandum, February 7, 1974, at 4. The Committee stated that:

"Because the Committee will handle the material it receives in judicious fashion, we see no reason for the Court to impose restraints as to how such materials may be used -- a course that, in any event, would be of doubtful validity in view of separation of powers and comity considerations." (citations omitted)

As previously noted, the Committee is now prepared to waive these legal considerations.

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Appellants represent to this Court, as they did to the Court below, that they will handle the materials judiciously and that a protective order is not necessary. But appellants will consent to a protective order if this Court deems it in order. In any event, this Court is free to determine the appropriateness of a protective order because it was raised below and not "sprung" for the first time on the appellant
*/
Court.

In addition, even if the question of a protective order had been raised for the first time on appeal, that does not deprive this Court of jurisdiction to hear the issue. As this Court pointed out in Dart Drug Corp. v. Parke, Davis & Co., 120 U.S. App. D.C. 79, 89, 344 F. 2d 173, 183 (1965), an Appellate Court is not "immobil e" where justice is involved" and may turn to "an examination on the merits of the points which counsel now says should have been made before"

*/ When this matter was before the District Court, appellants still planned further public hearings. This is not the case now and thus the protective order concept is more acceptable to the Committee. The protective order would pose no significant restrictions on the Committee as to its law-making function. And we would hope that events before May 28, the Committee's report filing date, would make it possible to lift whatever order was entered to allow the Committee to fulfill its informing function if such a task is still necessary.

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in the lower Court. Certainly this Court, if it concludes that the interests of justice so demand, can remand this case to the District Court with instructions to release the tapes under a protective order.

We also note that there is no provision . in the law that requires the Select Committee to ask for a rehearing on the issue of a protective order before appealing to this Court, especially since the issue was adequately raised and there is no indication that it was not considered by the lower Court. And, even if no one had suggested the propriety of a protective order, the Court below would have been entitled to grant such relief. See Rule 54 (c), Fed. R. Civ. P. Certainly one issue on this appeal is whether dismissal without prejudice was required or whether another remedy in the spectrum of judicial solutions was more appropriate.

The President's counsel suggest that a protective order would be unavailing because "leaks" from the Committee would undercut its provisions (Br 66). Several comments are in order. As the President's counsel know, the Committee has

*/ It was, of course, difficult to presage the Court's exact ruling before it was entered.

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received highly confidential national security materials from the Administration in the past that have not been "leaked" to the press or anyone else. Other sensitive material has been handled with tight security and has not been leaked. The observation of the District Court in the grand jury materials matter (pp. 19-20) is appropriate here:

" . . . The House Judiciary Committee has taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials. Nonetheless, counsel for the indicted defendants, some having lived for a considerable time in Washington, D.C., are not persuaded that disclosure to the Committee can have any result but prejudicial publicity for their clients. The Court, however, cannot justify non-disclosure on the basis of speculation that leaks will occur, added to the further speculation that resultant publicity would prejudice the rights of defendants in United States v. Mitchell, et al. We have no basis on which to assume that the Committee's use of the Report will be injudicious or that it will disregard the plea contained therein that defendants' rights to fair trials be respected!" (emphasis added)

We submit that the sensitivity that the Committee has shown in the past respecting the need for fair trials-- witness, e.g., the cancelling of its public hearings-- demonstrates that the materials in question would be handled with extreme caution. And we conclude by observing that the Committees' willingness to accept a protective order is just the type of Congressional accommodation that Justice Brennan recommended in his concurrence in Hutcheson v. United States, supra, 369 U.S. at 624-25.

Conclusion

The judgment of the District Court should be reversed in all respects or the Court, at the least, should remand with instructions to release the tapes to the Select Committee under a protective order.

Respectfully submitted,

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TRANSCRIPT OF PROCEEDINGS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN)
ACTIVITIES, etc., et al.,)
Appellants,)
v.)
RICHARD M. NIXON,)
Individually and as President)
of the United States,)
Appellee.)

No. 74-1258

Washington, D. C.

April 2, 1974

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

-----:
SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN
ACTIVITIES, etc., et al.,

Appellants,

v.

No. 74-1258

RICHARD M. NIXON,
Individually and as President
of the United States,

Appellee.

Washington, D. C.,

Tuesday, April 2, 1974.

The above-entitled matter came on for argument at
approximately 10:00 a.m.

BEFORE:

JUDGES BAZELON, WRIGHT, McGOWAN, LEVENTHAL,
ROBINSON, MacKINNON and WILKEY

APPEARANCES:

SAMUEL DASH, ESQ., Chief Counsel, Senate Select
Committee on President Campaign Activities, on
behalf of the Appellants, with RONALD D. ROTUNDA and
JAMES HAMILTON.

JOHN J. CHESTER, ESQ., The White House, Washington
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Prosecutor, 1425 K Street, N. W., Washington,
D. C. 20005; for the Special Prosecutor as
amicus curiae.

C O N T E N T S

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- - -

PROCEEDINGS

* * *

ORAL ARGUMENT OF SAMUEL DASH, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. DASH: * * * time when we filed our complaint.

The history of the case is shown in our docket entries in the Joint Appendix.

I would like to just briefly put the case in the context.

We are here on appeal from the order of Judge Gesell, after remand by this Court, Judge Gesell dismissing our complaint without prejudice.

Our complaint sought a declaratory judgment on the validity of a subpoena issued by the Committee for five taped conversations. This subpoena was served on the same day, July 23, 1973, as Special Prosecutor Cox served his subpoena for the Grand Jury.

Both derived from Mr. Butterfield's testimony before the Committee revealing the existence of the tapes.

Judge Gesell was assigned the case on remand, to reconsider the matter on the basis of the new jurisdictional statute Congress passed to permit appellant to pursue its litigation for the tapes.

When the case was before Judge Gesell, this Court

had already decided Nixon vs. Sirica, and the appellee President ultimately had surrendered the tapes considered in that case to the Grand Jury.

Those tapes, by the way, include the five taped conversations we ask, except for one, the tape of the second conversation on March 21st, and that tape has been given to the Grand Jury, as has been indicated in the papers before this Court.

Also, since Judge Gesell's order, the Grand Jury indictments have been returned in the Watergate case, and a sealed report, with sealed evidence, was submitted to Judge Sirica, and Judge Sirica, with the approval of this Court finally in Haldeman vs. Sirica, turned over the documents contained therein to the House Judiciary Committee now considering the impeachment issue. And this was done without objection by the President, and with the approval, in fact urging of the Special Prosecutor, the approval of the trial judge and, as I've said, the approval of this Court.

The President has also voluntarily sent over to the House Judiciary Committee the taped conversations we seek in this proceeding.

QUESTION: Mr. Dash, --

MR. DASH: Yes,

QUESTION: -- your subpoena which you seeked before in turn asks for any and all original electronic tapes.

Are those in the possession of the President?

MR. DASH: Well, they were in the possession of the President as of the time the subpoena was issued. As a result of the order of this Court and the final compliance by the President, those tapes have been surrendered to the Special Prosecutor.

Now, he -- I think the Special Prosecutor in his case, in his position before the court below, actually recommended that what we received is not the originals, since he has the originals now, but they are copies of the tapes. And it seems to me if the question posed is whether a subpoena asking for the original tapes is mooted because it's now not in the control of the President, it would seem that our subpoena asked for the taped conversations and that the copies of them would --

QUESTION: As I understand what you're saying, that in an injunction or a declaratory judgment would operate on the Special Prosecutor?

MR. DASH: No, we're not -- we're not proceeding against the Special Prosecutor. The case is a case on the subpoena on the President. And that the President, I think, can comply and our Committee would accept such compliance, with copies of the tapes.

I think a subpoena issued --

QUESTION: Does he have copies --

MR. DASH: What?

QUESTION: Does the President have electronic copies of the tapes?

MR. DASH: I understand that the President has electronic copies of the tapes surrendered to the Special Prosecutor, and it is the practice of any Committee subpoenaing documents of a party, including a party such as the President, to accept copies in lieu of originals; the taped conversations is what the Committee wanted.

And at the time we issued the subpoena, the originals were in the possession of the President.

QUESTION: So that any court order here would operate, as a practical matter, to require the Special Prosecutor to make available copies of the tapes, wouldn't it?

MR. DASH: Not necessarily. I don't think the order of this Court --

QUESTION: Where would the copies come from?

MR. DASH: The copies came from the -- the copies are in the possession of the President. I understand the President turned over the originals, but before turning over the originals that the White House technicians made copies of the tapes. And I'm certain -- and I'm sure that counsel for the President could --

QUESTION: So the President has at the moment

electronic copies of the original tapes.

MR. DASH: Of the original tapes. And we're not asking, before this Court, for any order directed to the Special Prosecutor; but we -- our case is a case on a subpoena directed toward the President, and the Committee would accept copies in lieu of the originals. And we think our subpoena can authorize us to do that.

QUESTION: I thought there were only transcripts.

MR. DASH: No, our subpoena calls for electronic copies; and, again, unless --

QUESTION: The Committee has called for original electronic tapes, --

MR. DASH: Original --

QUESTION: -- but copies of those would be --

MR. DASH: Right. What I'm saying is that it is --

QUESTION: I understand the President has in his possession copies, not transcripts, but copies --

MR. DASH: Copies. And --

QUESTION: -- and you would accept those?

MR. DASH: We would accept them. That is the practice of Committees who subpoena records of banks, records of individuals, where they, instead of offering their original records, offered to give copies; and the Committee can accept copies.

So we would construe our subpoena at this point to

be a subpoena for copies of the electronic tapes, and not seeking the original tapes which were transmitted to the Special Prosecutor. And the reason they were transmitted, the original tapes, was to allow the Special Prosecutor to make whatever tests that are necessary as to the validity of the tapes.

That's not an issue that our Committee is seeking to resolve.

Now, prior to getting into this basic argument, --

QUESTION: So you're not asking -- I assume you're not asking for a court order for the President to submit even the copies of the tapes under a declaratory judgment for the validity of the taped conversations --

MR. DASH: Yes, Your Honor.

QUESTION: That's the way you started, anyway. Is that correct?

MR. DASH: That's -- our complaint was for a declaratory judgment. It is true that --

QUESTION: You got a declaratory judgment saying it was valid, then that might be discussion on the clerical part of it?

MR. DASH: Yes, Your Honor. It is true that Judge Gesell below interpreted our complaint as a -- and our request for relief, not only for declaratory judgment for injunction, and in his order he denied the declaratory judgment and an

injunction; although our motion for summary judgment only asked for declaratory judgment. We didn't reach the question as to how it should be complied with if we did get the declaratory judgment.

I just want to briefly mention something that I think goes through this case as a thread, and that's a suggestion throughout the proceedings that in some way the appellant Select Committee has an inferior posture as to the tapes, inferior as to the Grand Jury, and as to the House Judiciary Committee.

And I suggest that we refocus on that issue briefly, because memories are short.

The first official response to the suspicion of coverup was the unanimous Select Committee creation by the Senate. Not an ordinary committee, to engage in general legislation, but a Select Committee, born out of crisis and to address the Watergate scandal. It was given a broad mandate in Senate Resolution 60, and the mandate was to make a complete investigation to discover the extent of illegality during the Presidential campaign of '72, and, based on the facts derived from that investigation, to devise remedies to safeguard the electoral process.

And I suggest that that responsibility is the highest constitutional responsibility that a congressional committee can have to preserve a democratic form of government.

And I really suggest that there is no standard, really, that could make the task to reform a system of government in future generations inferior to a Grand Jury need to determine probable cause of whether or not an individual is indicted. And no standard that could make a task to provide remedies to prevent a Watergate from ever happening again a task inferior to the House Judiciary Committee's responsibility to determine probable cause as to whether a particular President should be impeached.

Now, the Court's opinion below, of Judge Gesell, actually made the essential legal findings in favor of appellant. The Court decided that it had jurisdiction based on the new congressional grant of jurisdiction. It decided that the controversy was justiciable. It decided that the tapes sought were relevant to appellant's function, and that decision, by the way, is a decision with regard to pertinency and a decision with regard to legislative purpose, both from the point of view of constitutional power of the Congress and our own resolution.

And the Court rejected appellee President's claim of executive privilege on confidentiality grounds.

What the Court had originally asked the President to do is to follow the basis and the formula that this Court set down in Nixon vs. Sirica, and that is to submit to the Court particularized reasons concerning his claim of confidentiality.

The President did not comply with that, but merely made a general claim of confidentiality. And the Court found that that did not meet this Court's test and rejected the claim of executive privilege.

Also I think it's significant for the Court to note that after this Court, concerned with the claim by the President, through his counsel, that the conversations might be intermingled, and so that those matters which would be relevant and applicable under the Court's test to the -- being turned over to the Grand Jury, should be looked at very carefully. This Court set up a very careful formula, and provided a basis for the President to show particularized reasons, prior to any turnover to the Grand Jury, and especially even prior to any in camera listening to tapes.

But when the matter went back to Judge Sirica, the President did not assert any particularized reasons to the tapes contained in that subpoena, except to the conversation of September 15 in part; Judge Sirica ruled on that and withheld portions of that tape.

But as to all others, including the tapes we seek, there was no assertion of any particularized reasons, and have not been before Judge Gesell.

Therefore, on the findings made by Judge Gesell in the Court below, one would expect that the Court would support our complaint for declaratory judgment. But the Court,

switching from this Court's balancing test, with reference to executive privilege, a test that balanced the public interest to preserve the confidence of communications of the President against the public interest and need of the Grand Jury.

QUESTION: The question referred to, I take it, means that in Nixon v. Sirica, we said that where the seeker after confidential documents of the President's discussions asserts a compelling need, then there is no absolute privilege on the part of the President; and the Court, convinced of the strength in the assertion of the need, then proceeded to balance that against the compelling need theory.

Is that not what Judge Gesell did?

MR. DASH: No. Judge Gesel did not -- did not create a test or use a test with regard to our request for declaratory judgment, as set forth in Nixon vs. Sirica, which was this compelling need of the Grand Jury or, in this case, would be the compelling need of our Committee as opposed to the public interest-compelling need of the President to preserve his, the confidence of the communication.

What Judge Gesell said instead was that he was going to balance a different set of considerations: the public interest that existed in preventing prejudicial pretrial publicity as opposed to any need the Congress had for this information for legislative purposes.

QUESTION: But the fact that Judge Gesell did not

follow Nixon v. Sirica certainly is no warrant for our judgment.

MR. DASH: No, no. What I'm suggesting is that --

QUESTION: So that the next question for us is: Was there a sufficient compelling need asserted on particulars as to bring into play that balancing of --

MR. DASH: Well, I think, initially, Your Honor, the question in determining whether or not there is a compelling need, there also has to be a question as to whether or not the President has validly asserted an executive privilege claim which can be supported.

And the Court below, based on this Court's formula that there had to be particularized reasons established that there was confidentiality, found that there was no basis for the Court to assert any executive privilege.

I think this Court's Nixon vs. Sirica test on compelling need comes into play when, in fact, there is a valid assertion of an executive privilege claimed by the President.

And what I am suggesting is that the Court below held that there was no valid assertion of executive privilege by the President, because there was no evidence by that time that there was any confidentiality preserved in these tapes, and none asserted by the President when the Court asked the President to identify them.

I think this Court, even in Nixon vs. Sirica, had

ruled that actually there was no confidentiality remaining.

But this Court did make a finding rejecting the President's claim of executive privilege, and therefore, by making that finding, there was no need for the Court to bring into play this Court's balancing test of compelling need, but it did then find that it had to make another determination, and that is a public interest issue involving prejudicial pretrial publicity, as opposed to compelling need.

QUESTION: Because it's not a compelling need.

MR. DASH: Yeah, well, the question that we raise here is whether or not a court, where it finds jurisdiction, where it finds that the matters requested by the Committee are relevant to its functions within its resolution, where it finds justiciability in the controversy, that if there is no executive privilege claim, does the Court, even in its discretion, under -- in a complaint for declaratory judgment, have the right to interpose its own policy concerns in terms of issues of pretrial publicity.

And we suggest that in exercising its discretion, Your Honor, that the Court, although it has discretion, must exercise it within the bounds of strict legal limits. And the legal limits in the area of balancing congressional needs as opposed to pretrial publicity were clearly established by the Supreme Court in the Hutcheson case and in other cases such as Delaney, in which the Court held -- the Supreme Court

held in Hutcheson that even -- and that was a much more important case than this case in terms of seriousness of application -- was that even if the congressional committee is seeking information in an investigation of criminal conduct, which is the same criminal conduct that is the subject of concurrent prosecution, that courts should not limit the congressional investigation because of the overriding need of Congress to conduct its investigation than the separation of powers doctrine. And so we certainly submitted ourselves to the discretion of the Court in our complaint for declaratory judgment.

But the issue that the Court resolved in exercising its discretion was not within the legal limits that the Court could exercise it. It exercised, in essence, its own decision that the judicial process is superior and requires priority to legislative process. And I think on two bases: one is the Court's view that pretrial publicity has a higher priority public interest rating than a legislative committee need, even in a Select Committee like ours; and the second reason was that he preferred the judicial fact-finding process over the legislative fact-finding process.

And I submit to the Court that in exercising a discretion as to whether or not to enter declaratory judgment on the validity of a subpoena, this is not applying legal standards that the Court should apply in that way.

It seems to me that the Court, where the President asserted an executive privilege and rejected it, it didn't have the basis upon which to create a new balancing test. We're not challenging at all, we think that the balancing test that this Court sets forward in Nixon vs. Sirica is a compelling one and an important one.

We also suggest, Your Honor, that we can show a compelling need, but we feel that under the Court's own finding below that there was no proper claim of executive privilege, that what was left for the Court was to determine relevance: did our subpoena call for relevance argument?

QUESTION: Did they make such a claim?

MR. DASH: There was -- there was a claim of executive privilege presented by the President on the same basis that it was presented in the case of the Grand Jury subpoena.

And Judge Gesell ruled on that, and Judge Gesell ruled -- rejected it, after he first requested the President to submit particularized reasons to support this claim; and when the President failed to do so, he rejected the claim of executive privilege and moved to other considerations, not executive privilege, on the basis of these communications.

QUESTION: But in Sirica v. Nixon, the sequel to it, the requirement of a particularized claim came after he decided compelling need. Isn't that right?

MR. DASH: Yes, but at that time -- at that time you had before you the -- you had before you a question which had not yet been resolved by the Court below in terms of whether an executive privilege existed; the issue that was decided by Judge Sirica prior to coming to you was the question as to whether or not there was an unreviewable power in the President to refuse, under executive privilege. And that issue did not come up before this Court as to whether or not the President had actually validly asserted a claim of executive privilege.

And based on the formula that this Court set forward, to make that determination when it sent the case back to Judge Sirica, Judge Gesell was now in a position to execute your formula and to seek whether or not there was any valid claim of executive privilege on particular reasons.

QUESTION: As I recall the formula in Nixon v. Sirica, it was our characterization of the need for the Special Prosecutor in having demonstrated that we chose the overwhelming.

MR. DASH: That's true, and it was first shown before this Court. And what I'm suggesting -- what I'm saying is that after Nixon vs. Sirica, where this Court set guidelines, that was a unique position, the first time a confrontation between the President himself exerting executive privilege against a subpoena, indicating compelling need

came before the Court. Judge Sirica did not attempt to resolve that issue. This Court set the formula to be applied by the court below.

And what I submit, Your Honor, is that if the Court, following this Court's formula, found that there was no basis in confidentiality submitted by the President for executive privilege, then rejected the claim of executive privilege, then the compelling need is not necessary. We submit, Your Honor, that there's plenty in this record if the Court wishes to examine whether or not our committee had compelling need.

Our Committee's resolution mandated this Committee to determine the full extent to which illegal acts had been committed during the campaign of '72.

And I submit, Your Honor, that our jurisdiction as a committee to pass on presidential activities is greater than the Grand Jury's. Because this was the Select Committee on Presidential Campaign Activities, and the Congress has jurisdiction to legislate in this area and to legislate as to what a President may do as an incumbent President running for re-election.

And so, since our Committee had the -- and has the power to pass legislation and draft the legislation with regard to the power, as to what the incumbent President can do in running for re-election; it actually has a broader

jurisdiction than the Special Prosecutor, when he was before this Court, on the issue of presidential involvement.

And we also point out that after our original resolution, the Senate unanimously passed Resolution 194, which reaffirmed the need. And in that resolution, which we have in the record, the Senate unanimously said that the tapes we subpoenaed -- this was after we subpoenaed them -- that were vitally needed by the Committee to perform its function, and in the very Act, which was passed by the entire Congress, giving jurisdiction, the purpose of that Act was to allow this Committee to pursue its litigation for the tapes, and certainly the Congress would not have passed special legislation to give the district court original jurisdiction to let us pursue our litigation for the tapes if the entire Congress of the United States did not believe that there was a compelling need.

And we suggest that the presumptions that should lie in the determination by Congress as to its need to legislation should at least play an important and significant role in this Court's decision of compelling need. But the very nature of this Committee as a Select Committee to deal with the long-term reform system of government and electoral process indicates the very nature of the compelling need we have.

But I do suggest that under Judge Sirica's -- Judge

Gesell's ruling, where he rejects the executive privilege claim, that actually the test that this Court set does not come into play, and that he did use a different test. And we suggest that the test was not applicable.

Hutcheson, I think is a principal case we rely on, and Hutcheson is the case which, by the way, was argued before the Supreme Court by Special Prosecutor Cox when he was Solicitor General; and it's a similar case to this case, in that Congress sought the court's aid, through a contempt proceeding, to enforce its process. And it was more serious than this.

This was before the McClellan Committee that investigated improper labor activities. And Hutcheson's dilemma was, at the time, and he was a union official, and he was asked to testify. The Congress indicted him in Indiana. And at the time the law was that if he pled the Fifth Amendment in the congressional committee, he couldn't really assert a Fifth Amendment under U. S. vs. Murdock, where the incrimination would be in a State court. And also Indiana had a rule that if he pleaded the Fifth Amendment, it could be used against him for impeachment purposes at his trial.

And so he didn't plead the Fifth Amendment, and the -- Mr. Justice Warren and Douglas dissented in Hutcheson on the basis primarily that this -- the rule of law that the

Court applied on Fifth Amendment matters placed the subject of the investigation in a whipsaw arrangement, so that there could be a pretrialing of his case before the Congress and ending, he said, even if he pleaded the Fifth Amendment, or tried to, could be used against him in the State courts.

Since then, in Murphy vs. Waterfront Commission, the Supreme Court has reversed United States vs. Murdock, and also in Griffin vs. California, the Supreme Court has prohibited comment on the use of Fifth Amendment.

Based on these two later decisions, I submit that it is a fair guess, at least, that Mr. -- former Chief Justice Warren and Justice Douglas, who took very principal positions, and I think very important ones in Hutcheson, probably they would have joined the majority in Hutcheson under the present state of the law.

But Hutcheson is a very strong case, in holding that despite -- and Justice Harlan held -- that despite Hutcheson being held in contempt and the Court being asked to aid the Congress in pressing its process, in the fact that he would still have to go forward as a defendant in a criminal case, said that the Court could insist on his -- the Congress could insist on his testimony, and that the Court would uphold the contempt conviction in that case.

It seems to me that Hutcheson is a very strong case in our support.

We submit that there is possibly an argument that is being raised by the President and was suggested by the court below that aside from the executive privilege for confidentiality, that the President, because he has a duty, a constitutional duty, to see that the laws are faithfully observed or executed, has a right to withhold evidence because if he gives us the evidence we would probably use the evidence, and this would bring prejudicial pretrial publicity and the law would not be faithfully executed.

We suggest that the appellee never raised this question until the court below prompted it. We don't believe that it can be possibly a basis for withholding evidence from Congress, I think we'd be remiss in our duty to this Court and to the Committee I serve as Chief Counsel if I do not remind the Court that this appellee caused the dismissal of Special Prosecutor Cox, who successfully argued Nixon vs. Sirica before this Court, and sought to implement the decision in an effort to faithfully execute the laws.

But Congress creates the laws, Congress makes the laws, that must be executed, and it would be an anomaly if the duty to execute existing laws could be used to frustrate the creation of vitally needed new laws.

But, more important, the Congress has an equal if not greater oversight problem -- powers in the administration of existing laws, in Watkins in our brief and also a

number of other citations support that. And the obvious danger to Congress's oversight function if evidence could be suppressed under a claim of the presidential duty to see that the laws are faithfully executed, could be that they --

QUESTION: What do you mean when you say Congress has a greater oversight right, greater than whom?

MR. DASH: Than the appellee President. The President's constitutional duty is to see that the law is faithfully executed, but Congress's responsibility -- it's Congress that makes the laws, has, as I suggest, an equal if not greater responsibility to -- for oversight over the laws it creates and makes and their administration. And this is what Watkins points to, and all the cases point to when they say that Congress -- that when Congress acts in its oversight function, to determine whether the laws are being administered properly, when it investigates the possible corruption of the government in the administration of the laws, Congress acts in its most important function.

And these are the cases, by the way, that distinguish Watkins itself and the Kilbourn case, because they involve congressional investigations into private affairs; but here Congress is investigating --

QUESTION: But your problem is not with the President on that, but with Judge Gesell's idea to let the court grant on oversight, and interference with the court's

rights.

MR. DASH: Well, Hutcheson, as I suggest, Your Honor, has ruled on the court's right in this area, and the Supreme Court in Hutcheson said that when these two issues, when these two paths cross, that the right of Congress to proceed in its investigation should not be limited by the court.

QUESTION: Do you think you're particularly saying, then, that asserting in my Congress that access to the President's private files are necessary for any reform of social legislation would -- [indistinct] --

MR. DASH: No, I would never make that assertion. I think the Court reviews it, and the Court reviews it on the basis of whether or not, if there is a valid executive privilege.

It seems to me the assertion of Congress is certainly not in and of itself self-executing. Congress seeks to get the information to --

QUESTION: That resolution was not finally adopted -- the Senate adopted it finally -- is not determinative here.

MR. DASH: No, it's certainly not. What it is, I think it's only determinate, Your Honor, or at least persuasive on the compelling need of the Congress for the information; but by no means is the Congress asserting an unreviewable power.

I think this -- we come to the courts, as we've always argued, that the courts arbitrate that. But within, we still say, fixed principles of law.

What we submit, Your Honor, is that at the present posture of this case, under its recent events -- the March 18th event, which led to Judge Sirica's decision to turn over the documents to the House Judiciary Committee, and this Court's March 21st decision in Haldeman v. Sirica -- has really changed the basic nature of the case.

Even if Judge Gesell's balancing test is an applicable test, there's really nothing to balance left. Because the President, the Special Prosecutor, the trial judge and this Court have already taken the risk, and even a greater risk, because of prejudicial pretrial publicity. Because the amount of documents that have gone over to the House Judiciary Committee, without restriction, with the right to use them publicly prior to trial, which they most likely will have to do to complete their proceedings, is a much greater risk than giving us, in fact, the five conversations which have received so much publicity already.

And, in addition, although there was no restriction placed on the court, in the House Judiciary Committee, what we submit to Your Honors is that we now are in a changed position ourselves. When we were before Judge Gesell, the Committee had not decided to cancel its public hearings.

It has now decided to cancel public hearings, in an interest not to prejudge or prejudice trial.

And the Committee does not seek to receive the tapes for the purpose of public disclosure, which was the only concern that Judge Gesell had. It seeks to use them internally for its private determination as to the necessity of certain legislation, drastic legislation which will be required if the discrepancies that are before the Committee resolve through the tapes,

Therefore, what we submit to Your Honors and submit that we can ask for this, because it was raised below, both by the Special Prosecutor and by us, that we are willing, first of all, to assert a very cautious standard in using the tapes received, we have adopted the same cautious provisions which have been found by this Court and the trial court in the case of the Judiciary Committee in dealing with sensitive material. The Special Prosecutor -- the White House has turned over to us, on occasion, national security material which we have taken these precautions, and they have never become public. And numerous situations have occurred in this way.

But, beyond a voluntary use of precaution, this Committee, the appellant, is willing now to submit to a protective order if that meets the concern of the Court, which was the only concern of the court below, after it

resolved the validity of the subpoena, that we would use them publicly -- the assumption was we'd use them publicly and therefore prejudice the trial.

We would submit to a stringent protective order, so that the Committee would have the tapes for its internal use. And we submit that there's a guideline, Beck against Hutcheson by Justice Brennan, which gives some clue to how this Court can resolve the issue.

Mr. Justice Brennan said in Hutcheson, in page 624, "When a congressional inquiry and a criminal prosecution cross paths, Congress must accommodate the public interest in legitimate legislative inquiry with the public interest in securing the witness a fair trial."

And then in suggesting the kind of accommodation, the Court, through Mr. Justice Brennan, said in its concurring opinion: So long as the subject matter is not in an area in which Congress is forbidden to legislate, the mere fact that the conduct under inquiry may have some relevance to the subject matter of a pending state indictment cannot absolutely preclose congressional inquiry. Surely it cannot be said that a fair criminal trial and a full power of inquiry or interest that defy accommodation --

JUDGE BAZELON: Your time has expired.

MR. DASH: May I just conclude --

QUESTION: I have a question you can respond to.

MR. DASH: -- the last sentence I want to make, Your Honor, would be for the accommodation we suggest.

It was what he suggests, Your Honor, without concluding the quote.

JUDGE BAZELON: All right. Now ask your question.

QUESTION: Is it your view that there is enough -- that the jurisdictional statute which provides for a declaratory judgment has validity as to legislate between -- that there is no balancing other than the finding of legislature purpose -- that is, that it requires a predicate of legislative purpose; that there is no balancing beyond that?

MR. DASH: Well, again, if a subpoena -- if Congress, under Hutcheson, and the cases that follow Hutcheson, issue subpoenaed materials within its legislative purpose under its resolution, then, except for a valid claim of executive privilege, is our submission, Your Honor, that the Court, following these Court decisions, has a duty to support the subpoena. Of course, --

QUESTION: Under Watkins, Chief Justice Warren points out that now that the legislators have abandoned the practice of supporting subpoenas that are in the House or the Senate, as the case may be, and gone to the courts, when the courts come to consider the matter -- of course in that case on criminal defense coming into Congress, -- they will balance, they will take into account constitutional rights of the --

MR. DASH: Oh, yes.

QUESTION: -- person involved.

Wouldn't the Court also have to take into account the constitutional rights of the person other than the subpoenas addressed to where a subpoena is addressed to a bank, the Court might have to consider the right of the individual whose records would be disclosed, even though he's not directly the subject of the subpoena, I understand that to be the opinion of the Supreme Court in --

MR. DASH: I'm not sure that the, any cases of the Court, or anything that one would read into Watkins or any other case, calls for the Court to reach around and determine whether or not enforcing the subpoena of the Congress goes beyond the -- either the executive privilege issue that a President might raise, or a constitutional issue, a First Amendment issue, that the person subpoenaed may have.

Hutcheson, I think, was the clearest case in a contempt case, where the defendant himself -- and not only himself but other defendants who would be injured by his testimony -- was compelled, under pain -- in fact he refused to testify, and the contempt conviction was upheld by the Supreme Court, Your Honor, on the basis that the Court should not -- should not limit.

Now, the accommodation I was about to get to, and I don't have to quote Mr. Justice Brennan, was that what

Justice Brennan suggested, where you get this clash, and the crossing of the paths of a congressional inquiry and a criminal prosecution, is that the Congress could take the evidence in executive session, could postpone and cancel its public hearings.

We've done that. We have -- the Congress -- we are willing --

QUESTION: Those are all examples of what kind of equitable restrictions could be imposed, could be equitably handled, that they assumed that there has to be --

MR. DASH: Well, no, Mr. Justice Brennan doesn't suggest they can be imposed,

In Hutcheson, Justice Brennan concurring, suggests that Congress make the accommodation, but not under the Court's imposition. Hutcheson stands for the proposition, Your Honor, that the Court may not impose those conditions unless you have the constitutional right of a person before it to balance, unless you've got the executive privilege.

QUESTION: Well, that would be whether the judicial role is the same under the new jurisdictional statutes as it would be in a case of contempt.

MR. DASH: Well, the -- the --

QUESTION: That is, whether the Act of the Congress that authorized it has an affirmative appeal to the Court to get its equitable powers, which would mean that any,

any disregard would be punishable as a contempt of court, not as a contempt of Congress, doesn't require a court order, that is an issued order, not to say what the Congress did under its power but under the court's power. Doesn't that add something --

MR. DASH: Yes, and --

QUESTION: -- as far as power goes.

MR. DASH: Yes, and we do submit, Your Honor, that we don't go into court, as we did before Judge Gesell, and say, Here's our subpoena, and under -- here's our new jurisdictional statute; enforce it. There's much that the Court has to do, aside from even determining the question of whether it fits in with our resolution. And it does have discretion. But --

QUESTION: I know there's much that a court has to do, even in a contempt of Congress conviction.

MR. DASH: Yes.

QUESTION: I asked you whether there isn't more that a court has to do or has authority to do, under this jurisdictional statute, where its authorization, its action, judicial action in the court for the predicate of a contempt of court statute?

MR. DASH: Well, the only response I can make is: no more than it does under any other complaint for declaratory judgment. And if --

QUESTION: But if a complaint for declaratory judgment is considered to be sound and equitable, it would be an effective complaint for production if the party turns around and there is now a balancing.

MR. DASH: But the balancing, as I indicated before, was within legal standards.

QUESTION: Balancing of the confidentiality against public interest.

MR. DASH: Within -- well, the --

QUESTION: The ordinary equity balancing apparently doesn't fit.

MR. DASH: Yes, but the public interest in this case, which the Supreme Court has ruled in the balancing area, is that the public interest does not supersede the right of Congress, where there is a -- where there are underlying criminal charges.

What I am saying is that although the Court has discretion, the Court has to exercise the discretion within the limits of the legal decisions on the issues that it is exercising the discretion.

Now, the courts clearly have the discretion on balancing issue in executive privilege. It clearly has the discretion if a First Amendment or constitutional right were being asserted by the party. But on the broad, public interest of whether or not criminal trials take priority

over congressional legislation, I submit that that was outside its discretion. I submit that Hutcheson rules against that exercise of discretion.

JUDGE BAZELON: Will that be all?

QUESTION: I have no further questions.

JUDGE BAZELON: Very well, Mr. Chester, you may proceed.

ORAL ARGUMENT OF JOHN J. CHESTER, ESQ.,

ON BEHALF OF THE APPELLEE

MR. CHESTER: May it please the Court:

My name is John J. Chester. I am Special Counsel to the President. I am here on behalf of the President.

Mr. James D. St. Clair and Charles Alan Wright, who are on the brief; at my left are Mr. Sterlacci, Mr. Murphy and Mr. Smith, who are associated with us in the preparation of this matter.

I would like to just briefly touch on the facts and proceedings leading up to this case, to the extent that Professor Dash did not cover these particular points.

As the Court knows, the Senate Select Committee, and I'll refer to it simply as Committee in my argument, subpoenaed five tapes. All of these tapes purported to be conversations of the President with John Dean and others, and concerned other aides of the President.

These tapes were directly and clearly, as revealed

by the subpoena, tapes of conversations that the President had with those of his aides who were directly charged with assisting him as the Chief Executive Officer of the country.

These tapes were refused. Whereupon the Committee filed an action, particularly a declaratory judgment. As the Court knows, they could have cited the refusal for prosecution, they could have brought a contempt proceeding. I think they wisely deemed that these actions were inappropriate, and we concur with that conclusion.

But they did bring an action for declaratory judgment and an injunction.

To my knowledge, this is the first time that the Congress, the first time that the Congress has gone to the courts for the enforcement of a subpoena or for a declaratory judgment when it seeks information from the Executive in the history of the country.

We would point out, as has been mentioned, that in seeking the declaratory judgment they sought also an injunction. They sought the compulsory process of the Court. And while they subsequently filed a motion for summary judgment, the summary judgment, if it had been in their favor, certainly would have constituted effectually an injunction addressed to the President by the Court to deliver the subpoena.

Upon the hearing before Judge Gesell, the Court requested a letter from the President relative to executive

privilege, and a memorandum from the Special Prosecutor relative to the pretrial publicity, that pretrial publicity might have on pending indictments.

In response to the request of the Court, the President, by letter on February 6th, specified the grounds upon which he declined to produce the tapes. He stated that the disclosure of these conversations would not be in the national interest. The publication of these tapes to the world at large would seriously infringe upon the principles of confidentiality. And there would be possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time.

In other words, the assertion of the President relative to executive privilege was a two-pronged assertion. One was the assertion of confidentiality of conversations of the President with his aides; the second assertion was the effects of pretrial publicity.

So that, contrary to what Professor Dash has implied here, the -- Judge Gesell did not in fact say that there was no executive privilege. What he said in effect was that he was not honoring the President's assertion of confidentiality of communications, but he did sustain the President's position relative to pretrial publicity.

Since that hearing, then at the hearing the Court

concluded, and we find that we think that this conclusion is supported by the evidence that was submitted by the Committee, that the appellant had not shown a pressing need for the tapes, and that disclosure should be denied in order to protect the integrity of the criminal justice system.

We do not believe, and we do not assert that the Senate Committee was placed in an inferior position, as seems to be the position of Professor Dash here today.

We think that the Senate Committee has performed an outstanding service to the country. We think that that's not the question here, of its relative position with the Grand Jury or its relative position with the House Judiciary Committee.

We think that it had a job to do. It has done that job. And the question solely is, is, Does it need these tapes to complete its work?

Since that --

QUESTION: Mr. Chester, do you think there's anything less to affect judicial integrity on disclosure? I mean, hasn't this thing been so massive, so what small amount is this thing going to affect in the -- [indistinct]

MR. CHESTER: Well, may it --

QUESTION: Isn't the country long past that stage?

MR. CHESTER: Well, may it please the Court, the President is of the opinion that it would have an effect on a

fair trial and has so asserted in his letter, asserting executive privilege.

QUESTION: Well, that isn't really -- that wasn't written yesterday, either.

MR. CHESTER: No, sir, but --

QUESTION: Are you advancing any claim on executive privilege?

MR. CHESTER: I am not, sir.

QUESTION: Oh,

MR. CHESTER: Neither the claim on executive privilege relative to pretrial publicity nor the claim of confidentiality of communications.

I would say at this point, and I would like to make it clear, that with regard to the conversations that are on these tapes which are of the President's conversations and by the President with his aides and assistants, that we assert the position that executive privilege applies absolutely, and we assert the position that it may not be reviewed by the Court and is not a justiciable question.

We have recognized the practical situation that we're in in this Court today, and in the wisdom of Nixon vs. Sirica, as applied.

QUESTION: Well, you're in the same Court here today, you know, we could decide it either way.

[Laughter.]

MR. CHESTER: Well, may it please the Court, I would suggest to the Court that we could make it easy for everybody if we simply adopted Your Honor's opinion, dissenting opinion in Nixon v. Sirica, and adopted that today, and we could all go home and be happy with it. It's already written. [Laughing.]

And with Judge Wilkey's concurrence in the dissent.

QUESTION: In your claim of confidentiality, accepting Nixon vs. Sirica to be the law, do you have any present claim of executive privilege in the conventional sense of confidentiality if we assume that Nixon vs. Sirica will not be overruled -- [indistinct].

MR. CHESTER: We certainly assume that it is a confidence, that the conversations are confidential conversations. We assume that any conversation with the President is, on its face, confidential and is a privileged communication.

QUESTION: But Nixon vs. Sirica would just throw it out as far as the maintenance of the elements that existed, and you had there a balancing that these were conversations which the President had already agreed would be relayed to the Senate Committee, and that this is not now a case of covering other than the conversations of the President in a separation of agreement hearing.

This does not mean nothing more than would be involved in the case before -- [indistinct] -- be covered in

the release of these communications, these conversations to the Senate Committee.

What claim of executive privilege as to confidentiality remain, assuming that there's no absolute right and all that sort of thing -- [indistinct]

MR. CHESTER: Well, may it please the Court, the -- there has never been any waiver of the President's right to executive privilege pertaining to the tapes and to documents.

QUESTION: But that could come up, suppose there was a doctrine of waiver --

MR. CHESTER: I understand.

QUESTION: -- there is still the balancing in a case where the President has already said that the taking into account the needs of the Committee and that only executive waiver -- [indistinct] -- is it proper that the Committee should have the conversations, testimony about -- [indistinct] -- about the conversations.

What kind of basis is this to say that executive -- that the confidentiality aspect presupposes that it should not have supporting it the testimony of the witnesses?

MR. CHESTER: It is our position that there is a substantial difference between taped recordings and the conversations concerning the taped recordings.

It is our position that this points up the very need

for executive privilege in this type of thing.

The tapes -- in other words, the tapes, the very essence of executive privilege is for, is to protect conversations and deliberations that lead up to a final decision, and that it is only the final decision that is subject to the scrutiny of the public or subject to the scrutiny of the Congress.

QUESTION: Well, the objection to that point was made by Mr. Justice White --

MR. CHESTER: I understand.

QUESTION: -- in Nixon v. Sirica. And the Court said, well, it may be convictions that he made various points about why there might be convictions, and the Court said that all of those could be accepted, so that what would be turned over in the taped recordings was nothing more than some type of mechanical conversations -- [indistinct] -- and from that we conclude that material is not turned over, any part of the tape recordings, so far as I understand it, and I don't know how we can declare it -- [indistinct] That is, other than the conversations.

Now, I don't know why Nixon vs. Sirica isn't controlling on that part of confidentiality.

MR. CHESTER: We will concede that Nixon vs. Sirica is controlling here. But our point is that the tapes --

QUESTION: And it's also controlling that the

tapes don't really give anything more than the conversations, once they -- [indistinct].

MR. CHESTER: Well, this we do not concede. And we see -- and we have no basis for it, and it is our position that the tapes are still privileged, even though we believe that Nixon vs. Sirica held that they are qualified privilege, and subject to the balancing test. This doesn't alter the fact that the tapes are still privileged communication.

And under the President's letter.

We think that the district court in this case has properly reviewed, properly ruled that the President's immediate interest in faithfully executing the laws, and the judiciary's immediate interest in safeguarding the Constitutional right of every individual to a trial free from the probability of prejudicial pretrial publicity outweighs the interest of the Senate Select Committee in making future laws.

And we feel that the second question presented is whether the district court properly ruled that the Senate Select Committee failed to meet the burden of proof sufficient to obtain a summary judgment for relief sought, and we think an examination of the record clearly indicates that it failed to meet the burden of proof.

And we further state that, as a third issue here, that as to whether or not the Senate Select Committee may

properly request relief from this Court that was not sought from the district court.

In other words, a modification, seeking a modification of the decree to permit the entry of a protective order.

We would submit that the tapes are privileged communications of the President, being confidential conversations with his aides, that under Nixon vs. Sirica, that these are qualified privileges that are subject to modification upon contrary constitutional rights being asserted. And that the privilege depends on weighing of the public interest protected by the privilege as against the particular interest that would be served by disclosure in the particular case.

Now, we would submit that with the power of congressional investigation, we agree with Professor Dash that the Senate has a power to investigate for the purpose of legislating; that incidental to this power is some right to exposure, right to compel testimony, and a right to investigate, provided that it is tied to the purpose of legislating.

But that it may not -- the power of investigation is not an unlimited power, and it cannot, it must give way to certainly the balancing test when that power is in, becomes in conflict with another constitutional power.

If the Congress is subject, in other words, to the same provisions of weighing or of qualified privilege, that

the Executive is, and the same test must be applied to the Congress as is applied to the Executive.

They have chosen to invoke the powers of the Judiciary. This was done at their decision. The judicial function, we need not discuss in detail, but to decide cases in controversy, this is the power to decide for or against, to weigh and determine the balance of the equity; to issue compulsory process. And a function that has arisen since the Hutcheson case was decided, and that is that the duty of the court to protect persons who have been indicted for a crime from excessive pretrial publicity, as is set forth in the Estes and the Sheppard cases.

In Judge Gesell's opinion, he stated that the President does have an interest in preserving the orderly judicial process for resolving the issues that were presented to the Court. He stated that the -- that with regard to the publications of the tapes, that there was no question that publication of these tapes would generate extreme publicity. He said that the ends of justice will not be served, nor the integrity of our system, by the publication of these tapes at this time. And that the Committee had presented no compelling reason to have these tapes, in the face of the President's claim of executive privilege.

We submit that the Court can affirm this decision on the merits, but we don't agree entirely with the reasoning

of the Court, we do agree and ask the Court to support the conclusion that's been arrived.

We do not believe that on the basis of Nixon vs. Sirica that the balancing of -- that the Court did, and the weighing of inferences, based on what are undisputed facts in this case, that there is anything that could be called clearly erroneous in the Court's position.

I would state --

QUESTION: May I ask, counsel, whether any trials are slated to begin between the present trial in the case before the Grand Jury at present and the trial that is pending against -- [indistinct]

MR. CHESTER: I can only rely on the newspapers for my information, but it's my understanding that there is a trial presently scheduled in California, to start this month, involving Mr. Ehrlichman.

QUESTION: Well, I was thinking of the question of Judge MacKinnon, which I don't think was really answered, but he asked a second question as to confidentiality; that is, what amount of pretrial publicity will come out of disclosure to the Senate Committee, assuming that would put restrictions on the -- [indistinct] -- no public hearings; and is there any reliance on what the House -- [indistinct]

MR. CHESTER: Well, may it please the Court, we of course do not know what the House impeachment committee

will do with the tapes. We did know that the Grand Jury would maintain secrecy in its use of the tapes. What the House Judiciary Committee will do, we don't know; it's only speculative.

All we can say is that whoever makes the tapes public, we think that this will have, one way or another, a profound impact upon public opinion. I think that the Court can well take judicial notice of the headlines that seem to meet every discussion of tapes that have taken place since last summer, and they seem to -- the tapes seem to have an impact with the media, an importance given to them by the media far beyond what would be considered ordinary news of evidence, either in a Senate proceeding, a House proceeding, or in a courtroom proceeding.

QUESTION: Is it your estimation that there is still something lurking in the tapes that hasn't been disclosed, and would be of such tremendous value and influence on public opinion, one way or another?

MR. CHESTER: May it please the Court, I have not heard the tapes, and all I can do is to assert the fact that the President has asserted executive privilege with regard to the tapes for reasons best known to himself; and the decision is his to assert executive privilege and his decision alone. And I'm not in a position, nor do I believe -- nor do I believe is anyone in the position to measure the

motivation which may prompt him to do this.

QUESTION: Now, let me get it straight, I'm not -- I haven't read all the newspaper accounts or anything else, but aren't these the conversations that Dean has already testified to with respect to the hearings on the Hill?

MR. CHESTER: I believe Mr. Dean has testified, and I also believe that Mr. Haldeman testified.

QUESTION: And Mr. Haldeman and Ehrlichman?

MR. CHESTER: Yes, sir.

Now, may it please the Court, the --

QUESTION: You say you haven't heard the tapes, you're relying on the President's generalized statement of what he calls privilege rather than confidentiality -- [indistinct] -- execution of the law, and Judge Gesell, he didn't have the tapes, did he?

MR. CHESTER: No, sir.

QUESTION: So he hasn't made a statement on the basis of his listening to the tapes that there would be a disclosure that would affect the -- [indistinct]

MR. CHESTER: I would submit to the Court that our position is that, in the interest of the Presidency, that the tapes being conversations of the President with his own aides are privileged on their face.

QUESTION: Well, pardon me, I meant to separate out that question of confidentiality privilege, and I now am going

to the question of pretrial publicity, which separates the privilege --

MR. CHESTER: Yes, sir.

QUESTION: -- asserted by the President. And I'm on that question only for the purpose that whatever we have to say about confidentiality is already encompassed in the question, in your argument.

But on the question of what Judge Gesell posed, and keeping in mind that the reason for any relief he would provide on -- that he had not heard the tapes in order to make that judgment.

MR. CHESTER: That is correct.

The substance, the substance of the tapes and what the tapes deal with is well known by virtue of the testimony of Dean and Haldeman and Ehrlichman, and why -- and the Senate Committee basically is seeking these tapes and is seeking the tapes for the performance of what amounts to a judiciary and executive function, in that the -- what they are attempting to do is to determine who or if perjury was committed, and there is conflict in the testimony which they seek to resolve.

This in no way can go to the legislative function in which they are involved.

QUESTION: I'm not -- we have already found that legislative function that may be a very pressing function --

the word "pressing" seems to be used here as well as legislative function or --

MR. CHESTER: Or compelling.

QUESTION: But -- well, in the order the word exception has been used -- but I was just wondering, these tapes are going to be presented to the Petit Jury eventually, presumably on the theory of what has been going on now, even if they are, even if they, as ruled -- perhaps the Committee will tape the conversations, the testimony before the Senate Committee.

I don't quite know how the publicity operates there -- [indistinct] -- even if they have to go to trial. Sometimes the trial only repeats to the jury what everybody already knows otherwise, that -- [indistinct] -- that's the reason for a right to a fair trial. That's the nature of the thing.

MR. CHESTER: I think that anything -- I think that anything that involves direct quotations of the President of the United States with his aides is something that calls for a tremendous impact upon public opinion, just by the nature of the Presidency that is far different from the ordinary and compelling situation -- the ordinary situation.

We find, we --

QUESTION: How does that bear on the fair trial aspect of it, whether the jury will be able to determine this, that, or the other is perjury or not?

Wasn't that what it was going to be on -- the trial would be about whether there was perjury, wasn't that one of the --

MR. CHESTER: That's one of the points. That's one of the points.

And we believe that they -- we believe that the publication of the disclosure of the contents of the tapes is going to contribute to that pretrial publicity. And the President has, in consequence of his constitutional duty, as he sees it, has determined that this should not happen. And pursuant to his constitutional duties, he has asserted the determination, and the trial court found that his assertion required a greater balance than did that of the Senate Committee in its assertion that they needed it for a legislative purpose. Because there is no conceivably good legislative purpose that can be performed by their listening to the tapes.

They have already stated -- it's already been stated by two of the Senators on the Committee that they have sufficiently adequate information to write their report.

I would just like, in closing, I would like to touch on Hutcheson vs. the United States, the Committee, I think, relies very heavily on this case; I do not quite understand why. First of all, the case was decided before the Estes case and the Sheppard cases were decided; secondly,

it involves an individual and an individual's rights. It is not an adjudication of the rights of the President as against the rights of the Congress, which are co-equal branches of the government.

The case reaffirms the Watkins case as being the ruling case in this particular field.

It further reaffirms Quinn vs. the United States, which says that the power to investigate must not be confused with the powers of law enforcement.

We submit that behind Judge Gesell's opinion was the feeling from the evidence, the conclusion from the evidence that the Committee was intruding into the field of law enforcement and had abandoned its legislative intent, and that certainly there is no place, the dignity of the judicial process, the dignity of the processes affecting the Congress, the judiciary and the President all combine in an interest that we do not need, we certainly do not need any more ex parte revelation of testimony by the Senate Select Committee. And whether it comes in the form of testimony before the Committee or whether it comes in the form of a report by the Committee, because we do not believe that this is the best means of reaching the truth.

QUESTION: Counsel, during the hearings, a number of references were made at various times to the fact that they were trying to find out who was guilty. Did you extract from

those tapes in the record?

MR. CHESTER: No, sir.

QUESTION: Do you recall?

MR. CHESTER: Yes, sir.

QUESTION: Don't they agree there is quite a severe impact on the investigative function?

MR. CHESTER: They certainly do. Their investigative -- this is our position that they have abandoned the position -- they have, the Senate Committee has sufficient information upon which to decide what laws they should adopt; they don't need any more information.

QUESTION: Well, of course, these statements were made during the course of the investigation, before they made this particular -- arrived at this stage. It wasn't all the Senators; some of the Senators, in their questioning, indicated that they have a valid legislative purpose in mind. But there are others that stated that they wanted to find out who was guilty.

It just seems that those ought to be documented for the weight that they bear on it in the particular forum.

MR. CHESTER: May it please the Court, we do not presume, on behalf of the President, to control the Congress. It's one of the three great branches of the government. And we do not presume to tell them whether they can have hearings or whether they cannot have hearings.

What we are here today to assert is that in view of the compelling constitutional obligations that are on the other side, and on behalf of the Presidency, that they cannot and should not be able to invoke the powers of the judiciary to infringe upon the President's powers in a manner that is neither legal nor constitutional, and exceeds the bounds of their investigatory powers.

QUESTION: You haven't argued the political question.

MR. CHESTER: In view of Nixon vs. Sirica, we have not argued the justiciability question. As I stated earlier, we would be glad to, both in that case and in this case, to adopt your dissenting opinion.

QUESTION: Counsel, on this question of you can only investigate in this board of elections the function to legislate, it's as though there are cases like the Daugherty case and the case of the, in the First Circuit, of that Internal Revenue fellow, the Delaney case, which established that it is a legislative function to investigate the way in which the executive performs as a separate function from the function in which --

MR. CHESTER: I do not believe that those cases so hold. The Daugherty case was a case in which Mallory Daugherty, a brother of the Attorney General, was subpoenaed by the Committee and actually taken into custody on a contempt

proceeding. A writ of habeas corpus was filed to free him, and the Court held that -- and the basis for the writ was that the purpose of the investigation was to try Harry Daugherty, the Attorney General of the United States.

The Court held that on the facts as presented in that case and at that hearing that there was a presumption that the Court was serving a legislative purpose when it investigated the Department of Justice. And we do not assert anything different here. We do not question and have not questioned the right of the Senate Committee to investigate the Executive -- to investigate the Executive Department, as indeed it has, and as the President waived the executive privilege for the witnesses to testify.

What we do assert is that in that case there was a presumption of -- there was a presumption of legislative, of legislative purpose. And the presumption was not challenged.

Now, if the case had been somewhat different, and the Court would have found that there was not a legislative purpose, then Mr. Mallory Daugherty would have been turned free.

QUESTION: I think the presumption is that -- [indistinct] -- as for purpose in fact, but I don't think -- I don't think, in view of our testimony here, that it is a legislative function to investigate the administration

of the execution of law by the Executive.

MR. CHESTER: I think the Watkins case and the Hutcheson case both reaffirm, and the Delaney case, both reaffirm that there must be a legislative purpose to the investigation, or the investigation fails. I don't think that there's any question on this point.

QUESTION: But the point is that there is a legislative purpose in investigating the administration by the Executive -- [indistinct] -- that's the question.

MR. CHESTER: That's not the way I read the cases.

QUESTION: Well, of course, it has a collateral effect, of course the question is when it stops. When there's not enough to legislate, you can't go on and hang the noose.

MR. CHESTER: That's correct. It's not -- we're not -- in other words, the Senate is not in the law enforcement business.

Thank you, sir.

JUDGE BAZELON: All right.

As to time, you were well over --

MR. DASH: I know, I just -- just very briefly. I think just to reply to --

QUESTION: Excuse me, I'd like to ask the amicus a question.

MR. DASH: Yes, sir.

JUDGE BAZELON: All right. Mr. Lacovara.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,
ON BEHALF OF THE SPECIAL PROSECUTOR AS
AMICUS CURIAE

MR. LACOVARA: Your Honor.

QUESTION: I might as well ask the specific questions, if you want to extend your comments, you may.

MR. LACOVARA: Thank you.

QUESTION: Well, my question, Mr. Lacovara, is whether there is really any incremental pretrial publicity problem, as a followup on Judge MacKinnon's question. In view of the ruling in Haldeman vs. Sirica, if you had to face that problem of taking the risk of pretrial publicity in that case, you were willing to do it, now is there any incremental risk of pretrial publicity to Mr. Nixon if the tapes are presented to the Senate Select Committee?

What is the significance, in your view, or your responsibility -- is it your desire to, presuming it would do what can be done to assure fair trial and minimize the -- [indistinct],

MR. LACOVARA: Your Honor, consistent with our understanding of our responsibilities, we have not seen it necessary to oppose the application by the Select Committee for access to these tapes. We have taken the position, which is reflected in our brief before this Court, that an additional publicity that might be generated by

whatever use the Committee might make of these tapes, if it's held entitled to them and if they are produced, would be incremental only and, as we have indicated, even the incremental publicity about these conversations might not be the type of publicity which would be prejudicial or which it would be impossible for a trial court to deal with at the proper time.

And for that reason we have not found it necessary, as we did not find it necessary in supporting the Grand Jury's action, to take any action that overtly or subtly opposed the course that was being suggested.

QUESTION: Well, what do you mean -- in plain language, when you're talking about incremental --

MR. LACOVARA: Yes, sir.

QUESTION: -- tell us what you mean.

MR. LACOVARA: It would no doubt --

QUESTION: On the basis of the facts.

MR. LACOVARA: On the basis of the facts, without getting into the content of the tapes about which there has been a good deal of publicity by the participants in those conversations, it would no doubt be true that if the Committee obtained access to the tapes and if it elected, in some way, or was permitted in some way to play the tapes publicly, there would be additional newspaper stories about that fact.

That I would think would be the most extreme use of the tapes, from the standpoint of generating publicity, although it's conceivable that one could postulate, and we have not idea what the Committee would be doing on this score, that the Committee might use these tapes to purport to find facts, or resolve questions of guilt or innocence, and might -- again conceivably, speaking strictly hypothetically -- issue a report, saying so-and-so was telling the truth, and so-and-so lied; and we found evidence of certain kinds of criminal violations.

That would lead, no doubt, to considerable public attention for some time after the Committee made such a hypothetical release.

Whether that would irreparably prejudice all potential jurors and prevent them from saying that they could decide the case on the base of their own listening to the tapes in the courtroom, to decide for themselves what the significance of the tapes would be, is something that I frankly doubt.

QUESTION: Would it be fair to say that your position would be that the risk is more incremental, prejudicial to listening would not be enhanced unless there were a compelling legislative purpose concerned?

MR. LACOVARA: Well, Your Honor, we tried to avoid, as you can tell, being caught in this embrolio, and

I'm sure you can understand the reason for that, and I'm candid in conceding that to the Court.

We, as we've said in our various briefs before this Court, have tried to do everything that we can to avoid even the generation of publicity which we feel would not irreparably damage these prosecutions, simply because we don't want any problems where we can avoid them.

However, it's not a world completely of our own making, and there are other values to be served besides making our lives easier.

One of the values to be served is the value being served by the Select Committee's hearings, and the legislative activities in which it's engaged, whether they are viewed narrowly as simply performing a law-making function or whether they also are read broadly as involving an oversight function.

My position, then, would be, it would be unfortunate for any more publicity to be generated than necessary, but whether we would say that there has to be a compelling necessity test in order to allow anything else to develop that might cause us some problems, I would probably have to say I would not support such a test across the board.

It would depend on each case, what the particular justification was, whether the interest of the body or the agency or individual who wanted to do something that might

cause publicity.

QUESTION: That's a step that we might have to take on the basis of what the record shows with respect to that, isn't it?

MR. LACOVARA: Yes, sir.

QUESTION: In other words, we don't -- [indistict]

MR. LACOVARA: That's correct.

QUESTION: Well, your position -- I think it's stated on page 7 -- is that it would only marginally add to previous publicity. You say, "In addition, the publicity, as all prior publicity, will be largely factual."

Now, of course that is going to be largely commented on, the fact of the release, isn't it? I mean, the plain facts that come out is going to be a mere drop to the tremendous publicity that follows thereafter in the form of editorials, news reporting, media comment on it, isn't that right?

MR. LACOVARA: Well, you of course anticipate a gloss being placed on the facts, and I'm sure that will happen. What we were suggesting there is that the nature of the evidence which is at issue here, the mechanical recordings of conversations, is such that if it is disclosed, the public will have access to the facts and will be in a better position to make their own assessment than if there were simply editorial comments, drawing inferences from facts about

which the public had no particular or direct knowledge.
That was the simple point that we were trying to make there.

QUESTION: Of course that's true of the statements before the Senate Committee.

MR. LACOVARA: Yes.

QUESTION: What's been generated out of the facts reported in the Senate is ten times the amount of -- [indistinct]

MR. LACOVARA: I think that's true. But it's based on events which the public has been able to evaluate, and the public has not been forced to rely on the evaluations.

QUESTION: Do you think there is -- do you think they are still remembering what was said in the Senate hearings?

MR. LACOVARA: Well, I can only say that yesterday, despite prior claims in the Chapin prosecution, that it would be impossible to select a jury in this District that would be able to try the defendant fairly. Judge Gesell, the district judge involved in this proceeding, was able to select a jury that was apparently satisfactory, in several hours.

So apparently the inculcation of Watergate related events was not all that deep.

QUESTION: Let me ask Mr. Dash a question.

MR. LACOVARA: Your Honor, I have simply one point

to make, and the point is concerned with the nature of the tapes and in response to Judge McGowan's question earlier on in the argument. Mr. Dash mentioned that the four original tapes which were subpoenaed were in the custody of the Special Prosecutor. And this is not accurate.

These tapes have never been in our possession.

Pursuant to this Court's mandate in Nixon vs. Sirica, the original six-hour reels were surrendered to Judge Sirica, and they have been in the custody of the Court from that date until this. We have had access to the originals only in the custody of a United States Marshal, accompanied by representatives of the White House, for the purpose of making tests.

The tapes, the original recordings have at all times been in the custody of the Court.

The February 28th tape, which was not subpoenaed by us, is not in the custody of the Court. I believe that is still in the President's custody. A copy of that tape, however, in addition to being made available to us and the Grand Jury, and apparently to the House Judiciary Committee, has --

QUESTION: I'm sorry, the February 28th tape is still in the custody of whom?

MR. LACOVARA: Of the President.

QUESTION: Of the President?

MR. LACOVARA: Yes, sir. Because that was not covered by our subpoena and therefore was not turned over to Judge Sirica for the purpose of his examination for any particularized claims of executive privilege.

QUESTION: Is it your understanding that the White House has electronic copies available to them?

MR. LACOVARA: Well, counsel for the President could better address that, Your Honor; but I'm about as confident as I could be that they have kept copies. And I believe that a copy of the February 28th tape has been made available to the United States Attorney's office in New York in connection with the Vesco trial, and it's been submitted to the judge there, and a transcript of at least portions of that tape have been made available to defense counsel.

QUESTION: It seems to me there might be a difference in terms of the Senate Select Committee's need between a transcript, a stenographic transcript, and actual copies, electronic copies of the tape.

MR. LACOVARA: Well, it would depend on the --

QUESTION: I presume that that was the purpose, what they want, they would need recorded copies of the original recording.

MR. LACOVARA: Yes, I would think that it might make a difference, which version or which form the content of those tapes came to them in, depending on whether there was

an intention to play them at a public session. In which case, the recordings, whether originals or copies, would be the more pertinent, or whether they were simply to be used for whatever executive session purposes the Committee might want in framing its report, in which case perhaps a transcript might be sufficient.

But that's a matter, of course, that's beyond our ken.

I have nothing else to add, if the Court has not further questions.

JUDGE BAZELON: Thank you very much.

MR. LACOVARA: Thank you.

JUDGE BAZELON: Mr. Dash.

REBUTTAL ARGUMENT OF SAMUEL DASH, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. DASH: Just very briefly, because I know that the Court has listened to much argument.

I just wanted to point that Judge Leventhal was correct in his reference to Daugherty. On page 174, the Supreme Court stated that the power of inquiry with process to enforce it is an essential and appropriate auxiliary to the legislative function.

And this has been held in all of the cases that deal with it, including Watkins.

I think on the question that I think Judge MacKinnon

raised as to the Senators asking whether somebody is guilty. I think one of the questions that Senator Baker asked regularly was "What did the President know, and when?"

In McGrain, the Supreme Court of the United States in McGrain vs. Daugherty, dealt with the guilt of the Attorney General, and the Supreme Court said that Congress, in investigating facts to determine legislation, get into guilt matters, not for the purpose of a judicial role but to make a determination whether or not to legislate in that area.

I must remind the Court, our Committee is not a general Committee, it's a Committee on Presidential Campaign Activities, and we have to legislate with regard to the President and the incumbent President. And therefore, certain drastic legislation may depend upon presidential involvement.

It is true, by the way, that the February 28th tape, which we seek, was used in the Vesco case, and that already has been made somewhat public, in portions of that, and that is out.

I think it's quite clear --

QUESTION: [indistinct] -- access of the transcript in that --

MR. DASH: That portion of the transcript.

But what I say is that so much of the tapes, these, as I said, paltry few tapes that we seek now, not only have we had full testimony, but I think it's untrue, by the way,

as counsel for the President suggests, that we've got enough and our job is done.

What we have is a major discrepancy. We have Mr. Dean's testimony, we have Mr. Haldeman's testimony, and we certainly have the public statements by the President. It's very important for a committee, in making its findings of fact internally, even if it doesn't publish them, to come to legislation, it has to resolve these issues. And you certainly can't suggest that a committee abandon its responsibility to resolve the issues.

I just want to --

QUESTION: You mean made internal by the fact that -- as I read Nixon -- [indistinct] -- that there might be a problem with respect to the prospects that you are controlled not only by what the tape recording says, but what it says in view of what that --

MR. DASH: Yes --

QUESTION: -- they know what their duty is, but what that implies concerning being in the area in which there are discrepancies in view of what has been testified.

MR. DASH: Yes.

QUESTION: And this might be just for the purpose of --

MR. DASH: Yes, sir.

QUESTION: -- [indistinct] -- and they could not

make a determination.

MR. DASH: Yes, sir. That's why I used the term "internal use".

We're here now where the Committee has again showed, I think, its responsibility by cancelling its public hearings. Also postponing its report.

The Committee is seriously considering the question of whether, because of the public trials that are pending, it should make findings of fact. It should even involve itself in the question of a public finding on presidential involvement, although it will do this internally and privately.

What we're here now before the Court as saying is that the only concern -- and we're really addressing ourselves to what Judge Gesell ruled -- of course the Court can take a -roader view -- but Judge Gesell ruled that the only reason he did not rule in our favor is because he was concerned with our using the tapes publicly to prejudice the trial.

And what we're suggesting to the Court now is that his decision to dismiss the complaint without prejudice was an overreach and too broad, that that can be covered, if that was the concern, and we're now willing to do so, we are not going to have any more public hearings. We're willing to submit to protective order, we're willing to consider the question of internally finding our facts and not including

those findings in the report.

QUESTION: And do I understand you to say that you will not make any findings of fact and -- [indistinct]

MR. DASH: No, what I'm saying is that we won't publish the findings of fact.

QUESTION: That there will be a protective order that the Committee will not publish its findings?

MR. DASH: Well, this is a decision we -- I think in this particular case, just as you have, you have relied on the good faith and the precautions that the House Judiciary Committee, on these very same risks, on their precautions. I think you can rely on the Senate Select Committee's precaution. We have applied the same precautions.

And I think it's very fair to say that prior to these trials, that the -- whatever the Committee does internally in terms of using these tapes, it's going to make a report to the House as to its findings, and there will be public exposure of everything you turned over, allowed at least to turn over to the House Judiciary Committee.

Therefore, I suggest, that whatever risks the pretrial publicity is taking has been taken, and all we're -- what we ask for is a minimal area compared to what you've already done.

And just finally, with Judge McGowan's concern of compelling need, what we suggest is, Your Honor, that the

determination of the extent of compelling need to be balanced here on the question of the extent of the substantiality of the executive privilege claim.

And what we find here is that Judge Gesell ruled that there really was not substantiality as to that, and pretrial publicity is not an executive privilege claim.

Therefore, we feel, if you look at this record, you will find through our Resolution, through our own statement of facts, which is just as compelling as Mr. Cox's, the compelling need for our use for legislation.

May I just finally conclude that if we had been stopped earlier on the same argument that was made here before, Mr. Cox would not have been able to make the compelling need he did make before this Court, because he wouldn't have had the evidence. The testimony would not have come out, and the tapes would not have been revealed.

And that, I think, the Court should remember in terms of limiting a congressional committee that has the important responsibility that this Committee has, to look into the Watergate scandal and attempt to come up with remedies that will safeguard our electoral process.

This is a very important responsibility.

QUESTION: Counsel, you say you're willing to submit to a protective order.

MR. DASH: Yes, Your Honor.

QUESTION: Of course, any protective order to really do any protecting would have to prohibit disclosure until after the trials are over, wouldn't it?

MR. DASH: That protective order may so contain that requirement.

QUESTION: And at that time all this information would be made public, wouldn't it?

MR. DASH: That's true.

QUESTION: And so really what you're asking for is to limit this material into the -- [indistinct]

MR. DASH: No. But not for the purpose of publishing it, Your Honor, internally so that -- may I suggest, Your Honor, that the members of my Committee will not recommend to the Congress certain drastic legislation which may have to be recommended unless they make certain findings, and they can't make these findings unless they see the resolution of the discrepancies before the Committee.

And they can do that internally, without a public disclosure and without prejudicing trials.

QUESTION: What you're saying, though, is that their findings or their recommendations will be an indication as to what they have found from the tapes.

MR. DASH: Oh, well, I would suggest that if you're going to look at the possible prejudice to trials from the inferential determination that the facts might show, based

on a recommendation of a piece of legislation, I do submit, Your Honor, that this would carry possible pretrial publicity too far.

I don't think if we recommend, for instance, and one of the recommendations may be -- and I can't speak for the Committee, because the Committee hasn't even had it on the agenda -- we may, for instance, recommend that there be an institutionalized ongoing Special Prosecutor, because of the -- not being able to trust the conflicts that exist between the President and the Department of Justice.

Now, that kind of a finding, and a recommendation that a Special Prosecutor should continue as a form of ombudsman, I don't believe you could say that you could infer from that there was a finding of presidential involvement.

What I'm saying is that I don't believe, from our legislative recommendations, that you're going to draw the kind of prejudice that would interfere with trials. And we ask you to allow us to do our job, that the full Senate asked us to do, in insuring that this country has an electoral process that is safeguarded.

Thank you.

JUDGE BAZELON: Thank you, gentlemen.

[Whereupon, at approximately 11:30 a.m., the case in the above-entitled matter was concluded.]

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its
own name and in the name of the
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. GURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities

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APR 3 1974

CLERK OF THE UNITED
STATES COURT OF APPEALS

NO. 74-1258

Appellants

v.

RICHARD M. NIXON, Individually and as
President of the United States

Appellee

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF APPELLANTS

Appellants hereby move the Court for leave to file the attached Supplemental Memorandum of Appellants. As grounds for this motion, appellants state that the attached Memorandum is required to provide a complete response to a question put appellants' counsel at oral argument in this case on April 2, 1974.

Respectfully submitted,

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Chief Counsel

Fred D. Thompson
Minority Counsel

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- 2 -

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APR 3 1974

- CLERK OF THE UNITED
STATES COURT OF APPEALS

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, suing in its
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and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,
HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOYA, EDWARD J. GURNEY,
and LOWELL P. WEICKER, JR., as United
States Senators who are members of the
Senate Select Committee on Presidential
Campaign Activities

No. 74-1258

Appellants

v.

RICHARD M. NIXON, individually and as
President of the United States

Appellee

SUPPLEMENTAL MEMORANDUM OF APPELLANTS

At oral argument in this case Judge McGowan asked counsel
for appellants whether, under Nixon v. Sirica, ____ U.S.
App. D.C. ___, 487 F.2d 700 (1973), appellants must make
a threshold showing of compelling need for communications
claimed privileged by the President before any balancing test
respecting executive privilege is applied. Counsel believes
his answer to this question was incomplete and thus submits

- 2 -

the following elaboration of his response.

With all deference, we do not read Nixon v. Sirica in the manner Judge McGowan's question suggests. That case states that:

"Aplication of Executive privilege depends upon a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."

487 F.2d at 716.

Applying this test, this Court held that

" . . . the District Court may order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigation, unless the Court judges that the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury."

487 F.2d at 718

We perceive, in these two basic formulations of the balancing test, no requirement that compelling need be first shown before the balancing test is applied.

It is true that this Court has held that presidential conversations are "presumptively privileged." But this presumption should fall not only before a showing of compelling need, but also, for example, upon a demonstration that the contents of the conversations involved are no longer confidential or a showing that there is a prima facie case that the President and his closest associates have been involved in criminal conduct and the materials sought bear on that involvement.

* The Court in Nixon v. Sirica did find that the grand jury had a unique need for the materials in question, but did not rule that such a showing must be made before the balancing test is applied.

- 3 -

Moreover, even if compelling need is a threshold question in the normal case, it should not be here in light of recent history which makes it impossible to view the conversations on the tapes as "presumptively privileged." The five tapes have now been heard by the grand jury and turned over to the House Judiciary Committee. There are no restrictions imposed by the Court or the President on the use to be made by the House of this material. Moreover, the Special Prosecutor states that four of the five tapes will be introduced at future trials. (JA 155-6) The President has thus lost control of these tapes and it appears that eventually they will be publicly played.

These circumstances, as well as the findings of Nixon v. Sirica,^{*/} demonstrate conclusively that there is no longer any executive confidentiality -- the only interest shielded by the privilege -- to protect. Consequently, no presumption can remain as to the claimed privilege.

^{*/} The Court found that four of the five conversations here sought "are no longer confidential." 487 F.2d at 718

- 4 -

Moreover, as we asserted several times below and the
President has not disputed, ^{*/} the evidence before the Committee establishes a prima facie case that the President and his closest associates have been engaged in criminal conduct that the Committee is authorized to investigate. The tapes will supply evidence of that involvement and Nixon v. Sirica, 487 F.2d at 717, establishes that executive privilege cannot be successfully invoked to conceal wrongdoing by the Chief Executive or his closest associates.

Thus, it would be to wink at history to claim that the conversations sought are "presumptively privileged" at this stage. In fact, application of executive privilege cannot be justified on any theory. The presumption of privilege has thus been dispelled and any assertion that the privilege should be upheld on any ground is wholly untenable. Under the unique circumstances that now exist, we submit that appellants must only show that these taped conversations are relevant to its legislative purpose and are needed to fulfill its legislative missions. We submit we have established a demonstrable need for the tapes at issue. ^{**/}

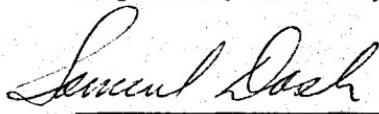
^{*/} See, e.g., Reply To Defendant's Response To Plaintiffs' Memorandum On Remand, pp. 10-11.

^{**/} Indeed, the Committee believes that it has shown a compelling need for the material in question. We should note, however, that it would be seriously debilitating to Congress' important oversight function respecting executive conduct to require that compelling need be first shown by Congress before a balancing test respecting the interests of Congress and the executive is employed. To adopt such a rule might make the executive all the more resistant to supplying information the Congress needs to fulfill its oversight responsibilities.

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Moreover, the Court below found that the "tapes are relevant to the Committee's functions". (JA 164).

Respectfully submitted,



Samuel Dash

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, suing in its own name and in the name of the UNITED STATES,)
and)
SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,)
HERMAN E. TALMADGE, DANIEL K. INOUYE,)
JOSEPH M. MONTOYA, EDWARD J. GURNEY,) No. 74-1258
and LOWELL P. WEICKER, JR., as United States Senators who are members of the Senate Select Committee on Presidential Campaign Activities)
Appellants)
v.)
RICHARD M. NIXON, individually and as President of the United States)
Appellee)

RESPONSE TO APPELLANT'S MOTION FOR
LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

The Appellee, Richard M. Nixon, by his attorneys hereby submits this Response to Appellant's Motion for Leave to File Supplemental Memorandum. Appellee submits that the Committee

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has been afforded ample opportunity to address the issues in its briefs and at oral argument before this Court. In fact, Appellee did not oppose the failure of the Committee to obtain leave of court to file a Reply Brief that exceeded the page limitation set forth by Rule 28(g) of the Federal Rules of Appellate Procedure. Nevertheless, we concur with counsel for the Committee that his response to Judge McGowan's question at oral argument was inadequate. Accordingly, we express no objection to the Committee's motion if this Court deems it helpful to have an additional submission on the question: whether, under Nixon v. Sirica, ___ U.S. App. D.C. ___, 487 F. 2d 700 (1973), the Committee must make a threshold showing of compelling need for communications claimed privileged by the President before any balancing test respecting privilege is applied. However, we feel constrained to point out that the Committee has once again misconceived the holding of this Court in Nixon v. Sirica and its application.

Since the Committee has submitted its Supplemental Memorandum before obtaining leave of court, we believe that fundamental fairness requires that the Court also have before it our understanding of this matter.

- 3 -

The Committee states at p. 2 of its Supplemental Memorandum that "[w]e perceive, in these two basic formulations of the balancing test, no requirement that compelling need be first shown before the balancing test is applied." This is still an inadequate answer as it ignores logic, case law and the Committee's own former position.

In Nixon v. Sirica, this Court recognized that the conversations involved here are "presumptively privileged." 487 F. 2d at 717. In the very next line this Court noted, "[b]ut we think that this presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." Id. Simple logic dictates that if a presumption is not to be merely illusory then a certain quantum of evidence is needed to overcome it. This Court has already noted that a claim of Executive privilege is entitled to "great weight." 487 F. 2d at 715. Thus the quantum of evidence required to overcome the privilege must be even greater. It must at least be "uniquely powerful" or as this Court stated in another part of the same opinion with respect to the Special Prosecutor's memorandum:

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This memorandum contains a particularized showing of the grand jury's need for each of the several subpoenaed tapes -- a need that the District Court subsequently and, we think, correctly termed "well-documented and imposing." 487 F. 2d at 705 (footnotes omitted).

Certainly, this language supports the proposition that before a court can even engage in balancing the party seeking disclosure must show a compelling need to overcome the presumption. Since the Committee has not made a "compelling showing of need" the Court below did not even have to balance, though its decision as a result of the balancing was correct.

In any event, such a compelling need must be consistent with the Committee's legislative function. Thus the Committee's assertion at p. 2 of its Supplemental Memorandum that the presumption should be overcome because of "a showing that there is a prima facie case that the President and his closest associates have been involved in criminal conduct and the materials sought bear on that involvement..." is a finding that the Committee is not constitutionally empowered to make. This determination can only be made by the operation of the judicial process, and is thus irrelevant to the Committee's functions. Quinn v. United States, 349 U.S. 155 (1955), Watkins v. United States, 354 U.S. 178 (1956). As stressed by our Brief on Appeal and at oral argument we

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submit that where a compelling need for access to the tapes to determine guilt or innocence was shown, the President has in fact turned them over to the proper forums, the Special Prosecutor and the House Judiciary Committee.

Counsel for the Appellee are unaware that the Committee had determined that such a prima facie case had been established. If, in fact, the Committee had not made such a determination, then the statement made by the Committee's counsel is not only gratuitous but it is also irresponsible. The fact of the matter is that no such prima facie case has ever been made. As has been pointed out, the Committee is simply not equipped or constitutionally authorized to adjudicate guilt or innocence, nor does it purport to do so. The Committee's constitutional function is to legislate and not to adjudicate criminal responsibility. We submit that the Supreme Court's prescription in Kilbourn v. Thompson, 103 U.S. 168 (1880), is not only instructive but controlling:

[W]e are of the opinion that the [Committee]
not only exceeded the limit of its own authority
but assumed a power which could only be
properly exercised by another branch of the
government, because it was in its nature
clearly judicial. 103 U.S. at 192.

- 6 -

Like many unsound arguments the Committee's assertion proves too much. For, if in fact, a prima facie case had been made out, it would, of course, constitute an adequate basis for curative legislation and the Committee's alleged compelling need would not exist. Thus the argument that the Committee may overcome the presumption by a showing of a prima facie case of criminality on the part of the President is not only an illogical argument, but it is one that does a great disservice to the Committee.

This Court in Nixon v. Sirica has noted: "[t]hat the President's special interests may warrant a careful judicial screening of subpoenas..." 487 F. 2d at 710. If this "judicial screening" is to be meaningful, it must occur before a court engages in the balancing process. For as this Court observed in quoting approvingly from Chief Justice Marshall in United States v. Burr, 25 Fed. Cas. 187 (Case No. 14,694) (1807):

The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. ***I can readily conceive that the president might receive a letter which it would be improper to exhibit in public***. The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. *** 487 F. 2d at 710 (emphasis added) (omissions in original).

Other cases also clearly demonstrate that in order for the court to balance, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In United States v. Reynolds, 345 U.S. 1 (1953), a case relied upon by this Court in Nixon v. Sirica, the Supreme Court noted:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. 345 U.S. at 110.

At another point in Reynolds the Supreme Court stated:

There are differences in phraseology, but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and "from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result." Hoffman v. United States, 341 U.S. 479, 487, 487, 95 L ed 1118, 1123, 1125, 71 S Ct 814 (1951). If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure. 345 U.S. at 9-10 (emphasis added).

* * *

[W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. Id.

Clearly the Court in Reynolds was admonishing lower courts to avoid considering the merits of a claim of privilege (i.e. balancing) until a threshold showing of need was convincingly demonstrated. The very fact that, in Reynolds, the Supreme Court would not "automatically require a complete disclosure to the judge" proves that a threshold need must be shown before the balancing test is even applicable.

Another case that illustrates this point is Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 463 F. 2d 788 (1971). There this Court noted:

Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even in camera disclosure,... 149 U.S. App. D.C. at 389, 463 F. 2d at 792 (footnote omitted).

Lastly, even the Committee in the court below recognized that a threshold showing of need was necessary to invoke the District Court's balancing:

Considering the Committee's need for this material elsewhere detailed, the application of the balancing test to this material will thus be a simple exercise. Reply to Defendant's Response to Plaintiffs' Memorandum on Remand at p. 4.

In any event, whether "compelling need" is a threshold requirement for a court to engage in the balancing process or is a part of that process, the Court below correctly found that the Committee failed to make a compelling showing of need.

At p. 3 of its Supplemental Memorandum, the Committee asserts that the five tapes are no longer "presumptively privileged" because they have been heard by the grand jury and turned over to the House Judiciary Committee. This argument misconceives the nature of the privilege that extends to the confidential communications of the President. This Court noted that the presumption of privilege could be overcome by the grand jury only "in the face of the uniquely powerful showing of the Special Prosecutor in this case," 487 F. 2d at 717, and that "[t]he strength and particularity of this showing were made possible by a unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. In addition, this Court in Nixon v. Sirica used the terms "critical" 487 F. 2d at 706, and "peculiarly necessary" 487 F. 2d at 717, to describe the grand jury's need for the subpoenaed tapes. No such descriptions can be used to describe the Committee's needs in this case.

Thus, the Committee's position is not analogous to that of the grand jury or the House Judiciary Committee for it has failed to show

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it has a compelling need or that it is functioning as a quasi-judicial forum with a constitutional responsibility to adjudicate questions of guilt or innocence.

While it is true that this Court in Nixon v. Sirica held that the presumption of privilege as to the five tapes may be overcome by a unique and compelling showing made by a grand jury and also that under a traditional waiver doctrine, the President can elect to waive the privilege with respect to the tapes, it does not follow that the privilege is universally removed as to anyone requesting access. As a practical matter, disclosure to a grand jury with its traditional secrecy and to the House Judiciary Committee which has established guidelines for maintaining confidentiality, and has yet to breach those guidelines, is fundamentally and substantially different from disclosure to the public at large. In this regard, this Court stated:

We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. 487 F. 2d at 715.

It would be anomalous indeed if surrender of the tapes to the grand jury because of its unique and compelling need and voluntary disclosure

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of them to the House Judiciary Committee, with its important constitutional role, were now to make them, as the Committee contends, fair game for the whole world.

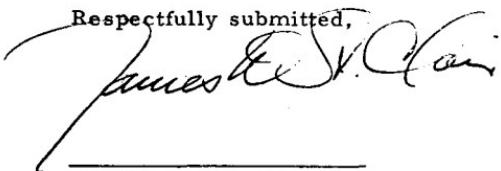
It should also be noted that the Committee asserts at p. 3 of its Supplemental Memorandum that "[t]he President has thus lost control of these tapes." The existence of this lawsuit and the appeal vigorously pursued by the Committee belie this assertion. Yet, if it were true, why does the Committee not seek to obtain access from those who, consistent with the Committee's assertion, would apparently have control of the tapes, the Special Prosecutor or the House Judiciary Committee.

We submit that an overriding purpose of this Court's decision in Nixon v. Sirica was to insure the proper functioning of the criminal justice system. Is it not paradoxical that the Committee now attempts to place itself within the unique and narrow confines of that holding, by incorrectly using that decision and inviting this Court to frustrate the fair administration of justice? In this regard it should be noted that the Committee has never addressed the Supreme Court's holdings in Sheppard v. Maxwell, 384 U.S. 333 (1966), and Estes v. Texas, 381 U.S. 532 (1965), and has completely ignored the public interest in preserving a defendant's constitutionally guaranteed right to a trial

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free from the probability of prejudicial pretrial publicity, and the President's responsibility to protect that right pursuant to the Constitution's Article II mandate "to take care that the laws be faithfully executed." Committee's failure to come to grips with the holdings in Sheppard and Estes is not surprising since its position is fundamentally inconsistent with and contrary to the teachings of the Supreme Court in those cases.

Respectfully submitted,



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, et al.,

Appellants

v.

Richard M. Nixon, individually and as President of the United States

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson, MacKinnon and Wilkey, Circuit Judges.

O R D E R

On consideration of appellants' motion for leave to file a supplemental memorandum and of appellee's response thereto, it is

ORDERED by the Court en banc that the motion is granted and the Clerk is directed to file the lodged supplemental memorandum of appellants.

Per Curiam


Hugh E. Kline

HUGH E. KLINE
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

September Term, 19 73
Civil Action 1593-73

Senate Select Committee on Presidential
Campaign Activities, suing in its own
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Appellants

v.

Richard M. Nixon, individually and
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United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 2 1974

HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson,
MacKinnon and Wilkey, Circuit Judges

C. R D E R

The Court takes judicial notice of the President's address to the nation of April 30th last and the subsequent release to the public of transcripts, with partial deletions, of each of the conversations recorded in the tapes that the Senate Select Committee seeks in the subpoena before us in this case.

It appears to the Court that the factual posture of this case is now as follows:

1. The originals of four of the five tapes subject to the Committee's subpoena -- those of September 15, 1972, March 13, 1973, and both tapes of March 21, 1973 -- have been delivered by the President to the District Court for the District of Columbia, pursuant to the District Court's order, see In re Grand Jury Subpoena Duces Tecum to Nixon, 360 F. Supp. 1 (1973), and are now in that Court's possession.
2. A copy of the fifth of the five tapes has been voluntarily transmitted by the President to the Watergate Special Prosecutor. See Reply Brief of the Senate Select Committee, et al., at 2-3.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

-2-

September Term, 19 73
Civil Action 1593-73

3. This being so, the Committee acknowledged at oral argument before this Court that, at least with respect to four of the five tapes at issue, the Committee would receive only copies rather than originals, if its subpoena was enforced in full.

4. The President has voluntarily submitted copies of each of the five tapes at issue here to the House Committee on the Judiciary. See Reply Brief at 3.

5. The Select Committee now has available to it the transcripts, of the five taped conversations, that the President has made public.

In light of the doctrines of Nixon v. Sirica and of the factual posture of this case described above, the Court asks the Select Committee to file a supplemental memorandum advising the Court of the current sense of the Select Committee as to whether it has a present sense of need for the materials subpoenaed. If such present sense of need is asserted, the memorandum should set forth in what specific respects the transcripts, and the materials that can be obtained from the House Judiciary Committee, are deficient in failing to meet the Select Committee's current need.

Per Curiam

RECEIVED

MAY 6 1974

CLERK OF THE UNITED
STATES COURT OF APPEALSTHE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON)
 PRESIDENTIAL CAMPAIGN ACTIVITIES,)
 suing in its own name and in the name of)
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 and)
 SAM J. ERVIN, JR., HOWARD H. BAKER, JR.)
 HERMAN L. TALMADGE, DANIEL K. INOUYE,)
 JOSEPH M. MONTOYA, EDWARD J. GURNEY,)
 and LOWELL P. WEICKER, JR., as United States)
 Senators who are members of the Senate Select) No. 74-1258
 Committee on Presidential Campaign Activities.)
Appellants)
 v.)
 RICHARD M. NIXON, Individually and as President)
 of the United States)
Appellee)

**APPELLANTS' SUPPLEMENTAL MEMORANDUM
IN RESPONSE
TO THIS COURT'S ORDER OF MAY 2, 1974**

This Court has asked appellants to advise it "of the current sense of the Select Committee as to whether it has a present need for the materials subpoenaed". The Court also requested appellants --if they assert a sense of need--to "set forth in what specific

respects the transcripts, and the materials that can be obtained from the House Judiciary Committee, are deficient in failing to meet the Select Committee's current need."

The Committee's answer to the inquiry whether it "has a present sense of need for the materials subpoenaed" is unequivocally and emphatically in the affirmative.

The transcripts released to the public constitute one of the most extraordinary documents of our time. Even the incomplete, edited and unauthenticated versions of the five conversations involved in this lawsuit now in the public domain fully vindicate the Committee's long-voiced claim that it should obtain these tapes so that it could fulfill its Constitutional duty to inform the public of the extent of corruption in the executive branch.

The Committee is now faced with the task of weaving the information revealed by the transcripts into the fabric of the total Watergate story so that, in its final report, it can inform the public of its conclusions as to Watergate. It also must evaluate the new information received to determine its bearing on legislative recommendations the Committee may make.

-3-

It is absolutely essential that the Committee, in order to meet these Constitutional responsibilities, be provided with a complete and accurate account of these conversations. This can be accomplished only by the provision of the actual tapes or verified copies thereof to the Committee. The Committee should not have to perform its legislative missions on the basis of transcripts that are suspect.

The public facts demonstrate that the edited versions provided the public are neither complete nor accurate. Thus, at the end of the edited version of the September 15 conversation the following entry appears: "NOTE (Further conversation following unrelated to Watergate)". See Submission of Recorded Presidential Conversations to the Committee of the House of Representatives by President Richard Nixon April 30, 1974 (hereinafter "Submission") at p. 75. We know, however, both from the testimony of John Dean (3 Hearings 958) and from the reconstruction of this conversation supplied the Committee by J. Fred Buzhardt, Special Counsel to the President (JA 80) that use of the IRS to investigate Administration enemies such as Lawrence O'Brien was discussed. Mr. Dean also testified (3 Hearings 958-9) that the replacement, after the election, of persons in the agencies not on the Administration's "team" was

discussed. The Select Committee has spent considerable time and effort investigating the politicization of the executive branch and the abuse of federal resources. Its report will include findings in this regard and may recommend significant legislation to remedy the abuses found. Clearly, the deleted portions of the September 15 conversation are highly relevant to its needs.

There also appear to be significant deletions respecting the February 28 conversation. At p. 98 of the Submission, the following phrase appears: "(Material not related to Presidential action deleted)". And, on p. 101, the following sentence appears twice: "(Material unrelated to Presidential action deleted)". The Committee does not know what material was deleted, but does note that the entire tape recording of this conversation was given the Special Prosecutor and the House Judiciary Committee by the President without any claim that parts of the conversation were not related to their inquiries.

Moreover, the transcripts made public, in addition to numerous deletion of "expletives", are rife with assertions that certain statements of the President and others are "inaudible" or "unintelligible". In regard to the five conversations here involved, there are 99 assertions in the Submission that portions of statements made by the President and others cannot be

-5-

deciphered. Fifty-nine of these assertions, which often concern omissions of what appear to be highly significant comments, relate to statements made by the President, twenty-nine to those made by Dean.—*/ But John Doar, Counsel to the House Judiciary Committee who has heard the tape recordings of a number of presidential tapes, including the five at issue here, has publicly stated that purported "inaudible" portions of the tapes can be heard and understood by the use of more sophisticated equipment than apparently employed

*/ The crucial nature of certain "inaudible" omissions is illustrated by a passage in the Submission from the March 13 conversation at p. 123-4:

D . . . what Bill Sullivan's desire in life is, is to set up a domestic national security intelligence system, a White House program. He says we are deficient. He says we have never been efficient, because Hoover lost his guts several years ago. If you recall he and Tom Huston worked on it. Tom Huston had your instructions to go out and do it and the whole thing just crumbled.

P (inaudible)

The Select Committee devoted considerable effort to an investigation of the Huston plan and the President's role in it, which has never been precisely determined. Its report may contain findings in this regard and legislative recommendations to prevent future conduct of this nature. An accurate determination of the President's exact response to Dean's observations could be quite significant to the Committee regarding its legislative missions. Other examples of apparently significant omissions of this type are found in the Submission at pp. 155, 182 (first "unintelligible"), 187, 213, 239, 244, 261.

by the White House. See Washington Post, Thursday, May 2, 1974, p. A14, col. 3-4. Mr. Doar is also quoted as saying the White House transcriptions "are not accurate".

It is appropriate, at this juncture, to remove a possible misconception this Court may have. The Court's order may be read as based on an assumption that certain materials "can be obtained /by the Select Committee/ from the House Judiciary Committee." This assumption, if it exists, is inaccurate. While the Select Committee has made all the materials in its files available to the House Judiciary Committee, the arrangement has not been reciprocal. The House Committee has not supplied the Select Committee with factual information to assist the latter in its investigations and the attached letter from John Doar indicates that the House Committee has determined that it cannot release the actual tapes of the five conversations to the Select Committee even though partial transcripts of these conversations are now available.

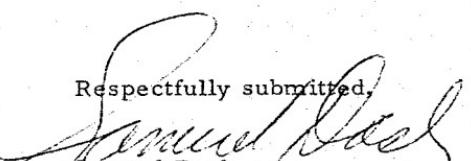
Finally, we would point out the obvious--that transcriptions of tape recordings are never adequate substitutes for actual recordings of conversations. Recordings allow one to hear voice tone and inflection. Voice tone and inflection are crucial in determining the exact thrust and import of a conversation.

especially where the actual words are ambiguous. The President himself has stressed the ambiguity of the transcripts and certainly some portions are. Thus, only the actual recordings will allow the Committee fully to understand what was said and to meet its Constitutional responsibilities.

We can see no real reason why the President should object to release of the tapes to the Committee at this stage. The Committee will still agree to a protective order that will prevent the public playing of the tapes and thus the airing of embarrassing expletives, adjectives, and characterizations will be avoided. Moreover, after disclosure of these transcripts to the public, the President can hardly claim that any interest in preserving fair trials should prevent release of the actual tapes to the Committee. Nor can he legitimately claim that any interest in preserving the "confidentiality of presidential conversations that take place in the President's performance of his official duties. . . to protect the effectiveness of the executive decision-making process"--the only interest the doctrine of executive privilege is intended to protect (see Nixon v. Sirica _____ U.S. App. D.C. _____, 487 F.2d 700, 717 (1973)--is a reason to deny the actual tapes to the Committee. Clearly, the interest in presidential confidentiality that led to the establishment of the Nixon v. Sirica

balancing test, which gives a President, upon a legitimate assertion of privilege, a measure of protection against an otherwise valid subpoena, is no longer relevant to this case. Because no valid claim of executive privilege or the need to protect criminal trials can be asserted, and because the Select Committee has a demonstrable and compelling need to receive full and accurate accounts of the conversation at issue, this Court should declare that appellants' subpoena--which was for tape recordings, not transcripts--is valid and thus allow appellants to complete their legislative responsibilities on the basis of complete and accurate information.

Respectfully submitted,


Samuel Dash

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Congress of the United States

Committee on the Judiciary

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May 6, 1974

Mr. Samuel Dash
 Chief Counsel
 Select Committee on
 Presidential Campaign Activities
 U. S. Senate
 Washington, D. C. 20510

Dear Mr. Dash:

This is in reply to your letter of May 2. The Judiciary Committee is conducting its impeachment inquiry under strict rules of confidentiality. A copy of these rules is enclosed. As you can see from these rules, there would be no way that I could release to you the materials.

I know of no way the materials could be obtained from the House Judiciary Committee until the Judiciary Committee decides in the course of its own inquiry to make them public.

Sincerely,

JOHN DOAR
 Special Counsel

Enc.

93d Congress }
2d Session

HOUSE COMMITTEE PRINT

PROCEDURES FOR HANDLING IMPEACHMENT INQUIRY MATERIAL

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COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION



FEBRUARY 1974

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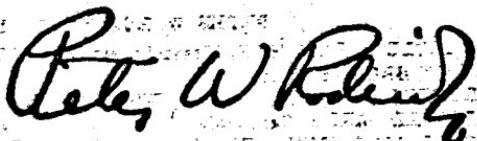
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Foreword

On February 22, 1974, the full Committee on the Judiciary unanimously adopted a set of procedures for handling material gathered in the course of its impeachment inquiry.

I am pleased to make available by this document a copy of the adopted procedures.



PETER W. RODINO, Jr.

(III)

Procedures for Handling Impeachment Inquiry Material

1. The chairman, the ranking minority member, the special counsel, and the counsel to the minority shall at all times have access to and be responsible for all papers and things received from any source by subpoena or otherwise. Other members of the committee shall have access in accordance with the procedures hereafter set forth.
2. At the commencement of any presentation at which testimony will be heard or papers and things considered, each committee member will be furnished with a list of all papers and things that have been obtained by the committee by subpoena or otherwise. No member shall make the list or any part thereof public unless authorized by a majority vote of the committee, a quorum being present.
3. The special counsel and the counsel to the minority, after discussion with the chairman and the ranking minority member, shall initially recommend to the committee the testimony, papers, and things to be presented to the committee. The determination as to whether such testimony, papers, and things shall be presented in open or executive session shall be made pursuant to the rules of the House.
4. Before the committee is called upon to make any disposition with respect to the testimony or papers and things presented to it, the committee members shall have a reasonable opportunity to examine all testimony, papers, and things that have been obtained by the inquiry staff. No member shall make any of that testimony or those papers or things public unless authorized by a majority vote of the committee, a quorum being present.
5. All examination of papers and things other than in a presentation shall be made in a secure area designated for that purpose. Copying, duplicating, or removal is prohibited.
6. Any committee member may bring additional testimony, papers, or things to the committee's attention.
7. Only testimony, papers, or things that are included in the record will be reported to the House; all other testimony, papers, or things will be considered as executive session material.

(1)

Rules for the Impeachment Inquiry Staff

1. The staff of the impeachment inquiry shall not discuss with anyone outside the staff either the substance or procedure of their work or that of the committee.
2. Staff offices on the second floor of the Congressional Annex shall operate under strict security precautions. One guard shall be on duty at all times by the elevator to control entry. All persons entering the floor shall identify themselves. An additional guard shall be posted at night for surveillance of the secure area where sensitive documents are kept.
3. Sensitive documents and other things shall be segregated in a secure storage area. They may be examined only at supervised reading facilities within the secure area. Copying or duplicating of such documents and other things is prohibited.
4. Access to classified information supplied to the committee shall be limited by the special counsel and the counsel to the minority to those staff members with appropriate security clearances and a need to know.
5. Testimony taken or papers and things received by the staff shall not be disclosed or made public by the staff unless authorized by a majority of the committee.
6. Executive session transcripts and records shall be available to designated committee staff for inspection in person but may not be released or disclosed to any other person without the consent of a majority of the committee.

(2)



May 2, 1974

Mr. John Doar
Special Counsel
Committee on the Judiciary
House of Representatives
Washington, D.C.

Dear Mr. Doar:

Today the Select Committee received an order from the Court of Appeals in our pending case before the Court relating to the Committee's subpoena. I am attaching a copy of this order to this letter.

top 20
As you know the subpoena of the Committee is for the conversations in the Oval office between John Dean and the President on September 15, 1972, February 28, March 13, and March 21, 1973. It is our understanding that copies of these taped conversations have been provided to the House Judiciary Committee.

In the Court's order there appears to be an assumption that materials in the possession of the House Judiciary Committee can be obtained by our Select Committee from the House Judiciary Committee. In the case of our subpoena such materials could only be the tape recordings. This assumption is important since the Court has asked the Select Committee to file a supplemental memorandum indicating what is the Committee's "present sense of need for the materials subpoenaed." The Court further states in its order that if the Committee asserts that it still has need for the materials subpoenaed that its supplemental memorandum should set forth "in what specific respects the transcripts, and the material that can be obtained from the Judiciary Committee are deficient in failing to meet the Select Committee's current need."

In response to the Court's order, the Committee wishes to file a supplemental memorandum as quickly as possible. To properly file this supplemental memorandum, we must inquire of the House Judiciary Committee whether the five tape recordings which the

Mr. John Doar
Page 2
May 2, 1974

Senate Select Committee subpoenaed from the President may be obtained from the House Judiciary Committee by the Select Committee.

I would appreciate your replying to this question as quickly as possible so that we can immediately file our supplemental memorandum in the Court of Appeals.

Sincerely,

Samuel Dash
Chief Counsel

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

September Term, 19 73
Civil Action 1593-73

Senate Select Committee on Presidential
Campaign Activities, suing in its own
name and in the name of the United
States, et al.,

Appellants

v.

United States Court of Appeals
for the District of Columbia Circuit

Richard M. Nixon, individually and
as President of the United States

FILED MAY 2 1974

HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson,
MacKinnon and Wilkey, Circuit Judges

O R D E R

The Court takes judicial notice of the President's address
to the nation of April 30th last and the subsequent release to
the public of transcripts, with partial deletions, of each of the
conversations recorded in the tapes that the Senate Select
Committee seeks in the subpoena before us in this case.

It appears to the Court that the factual posture of this
case is now as follows:

1. The originals of four of the five tapes subject to the
Committee's subpoena -- those of September 15, 1972, March 13,
1973, and both tapes of March 21, 1973 -- have been delivered
by the President to the District Court for the District of Columbia,
pursuant to the District Court's order, see In re Grand Jury
Subpoena Duces Tecum to Nixon, 360 F. Supp. 1 (1973), and are
now in that Court's possession.

2. A copy of the fifth of the five tapes has been voluntarily
transmitted by the President to the Watergate Special Prosecutor.
See Reply Brief of the Senate Select Committee, et al., at 2-3.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1258

-2-

September Term, 19 73
Civil Action 1593-73

3. This being so, the Committee acknowledged at oral argument before this Court that, at least with respect to four of the five tapes at issue, the Committee would receive only copies rather than originals, if its subpoena was enforced in full.

4. The President has voluntarily submitted copies of each of the five tapes at issue here to the House Committee on the Judiciary. See Reply Brief at 3.

5. The Select Committee now has available to it the transcripts, of the five taped conversations, that the President has made public.

In light of the doctrines of Nixon v. Sirica and of the factual posture of this case described above, the Court asks the Select Committee to file a supplemental memorandum advising the Court of the current sense of the Select Committee as to whether it has a present sense of need for the materials subpoenaed. If such present sense of need is asserted, the memorandum should set forth in what specific respects the transcripts, and the materials that can be obtained from the House Judiciary Committee, are deficient in failing to meet the Select Committee's current need.

Per Curiam

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, suing in its own)
name and in the name of the)
UNITED STATES,)
and)
SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,)
HERMAN E. TALMADGE, DANIEL K. INOUYE,)
JOSEPH M. MONTOYA, EDWARD J. GURNEY,)
and LOWELL P. WEICKER, JR., as United)
States Senators who are members of the)
Senate Select Committee on Presidential)
Campaign Activities)
Appellants)
v.)
RICHARD M. NIXON, individually and as)
President of the United States)
Appellee)

No. 74-1258

MEMORANDUM OF APPELLEE IN RESPONSE
TO APPELLANTS' MEMORANDUM OF MAY 6TH

At page 3 of its Supplemental Memorandum in Response to this
Court's Order of May 2, 1974,^{1/} the Committee states that "it is
absolutely essential that the Committee, in order to meet [its]
responsibilities, be provided with a complete and accurate account of
these conversations. This can be accomplished only by the provision
of the actual tapes or verified copies thereof to the Committee." This

1/ Hereinafter referred to as "Memorandum in Response."

-2-

statement not only contradicts prior statements of some Committee members and its counsel^{2/} but documents the Committee's improper insistence in attempting to perform law enforcement and guilt adjudicating functions, itself. Such proposed activity clearly exceeds its constitutional authority, and properly falls within the jurisdiction of the Special Prosecutor and the Committee on the Judiciary, United States House of Representatives.

Nevertheless, the response to this statement is starkly simple: the Committee has been provided with a complete and accurate account of all Watergate-related portions of privileged Presidential conversations sought by its subpoena. Thus it can hardly be reasonably contended with any degree of sincerity that the Committee is being unduly frustrated in carrying out its informing function. This is especially highlighted by the fact that the transcripts supplement the information the Committee already has, consisting of approximately ten thousand pages of public testimony, and undoubtedly many additional pages of non-public testimony taken in Executive Session. It must be remembered that much of this testimony was supplied by Presidential aides and advisors. And, of course, that testimony was available only because the President waived privilege, both executive and attorney-client, permitting his aides to testify.

It is now beyond question that any additional type of information that the tapes could provide relates only to guilt or innocence and to the

2/ See footnote 16, on pp. 28-30, of Appellee's Brief in this Court.

credibility of witnesses, if they could provide that. A most important point to be noted in this regard is that where the five tapes in question have been requested for proper governmental functions -- the judicial determination of criminal conduct or the removal of executive officers via impeachment for grave crimes -- the President has submitted them to the appropriate forums, the Special Prosecutor and the House Judiciary Committee.

However, the Committee insists upon performing law enforcement and guilt adjudicating functions, activity that clearly exceeds its constitutional authority and represents an unwarranted, unconstitutional usurping of functions expressly assigned by our Constitution, excepting impeachment proceedings, to the Executive and the Judiciary. See Watkins v. United States, 354 U.S. 178, 187 (1957); Quinn v. United States, 349 U.S. 155, 161 (1955); Kilbourn v. Thompson, 103 U.S. 168, 192 (1880). Thus it is patently obvious that any legitimate need that the Committee sought to fulfill by the subpoena in question here has been completely satisfied.

Counsel for the Appellee take the strongest possible exception to the tone and substance of a gratuitous statement found in the Committee's Memorandum in Response. At page 3 of the Memorandum in Response, Counsel for the Committee allege that the "transcripts . . . are suspect." This charge cannot be supported by the personal knowledge

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of the Committee as evidenced by the very existence of this appeal. The argument must therefore be predicated on considerations of convenience and expediency. Minor inaccuracies indeed may exist but there is no suggestion that the transcripts are substantively inaccurate.^{3/} We can only assume by this charge that the Committee's counsel believe that the transcripts of the tapes sought herein are, in some way, not an accurate description of the taped conversations. The President has provided the Special Prosecutor and the whole House Judiciary Committee with full access to the five taped conversations sought by this Committee and no such charge has been made by them. It defies credulity for the Committee's counsel to suggest that the President would not provide the best possible transcription and at the same time furnish the House Judiciary Committee and the Special Prosecutor the same actual tapes from which the transcripts in question were made.

On April 29, 1974, the President, in a speech to the Nation, emphasized that his unprecedented disclosure of over 1,200 pages of privileged, private conversations represented the whole Watergate story. The President stated:

3/ It is reported in the New York Times, May 9, 1974, p. 32, col. 3 that Mr. John Doar, Special Counsel to the House Judiciary Committee, "emphasized that he was not saying there were 'gross inaccuracies or distortions' in the President's transcripts." It should be remembered that the Committee's only source for its assertion concerning the alleged inaccuracy of the transcripts is a press report of a statement allegedly made by Mr. Doar.

They include all the relevant portions of all of the subpoenaed conversations that were recorded -- that is, all portions that relate to the question of what I knew about Watergate or the cover-up, and what I did about it. They also include transcripts of other conversations which were not subpoenaed, but which have a significant bearing on the question of Presidential actions with regard to Watergate.

* * *

As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials -- together with those already made available -- will tell it all.

Thus it should be clear that the Select Committee has been provided by the President with all Watergate-related material concerning the President's conversations.

At page 3 of its Memorandum in Response, the Committee attempts to bolster its specious argument that "the edited versions provided the public are neither complete nor accurate," by stating, "at the end of the edited version of the September 15 conversation the following entry appears: 'Note (Further conversation following unrelated to Watergate).'" The Committee then continues to argue that it needs that subsequent portion of the conversation to complete its investigation. What the Committee fails to realize is that the District Court in a previous case specifically dealt with the September 15, 1972, tape in question. Concerning this very same taped conversation, the District Court held:

The claim of privilege, which related to the latter portion of the recorded conversation, is sustained

in full for the reason that the privileged portion consists of discussions with and advice from the President's senior assistant and his counsel on matters relating to the President's conduct of his official duties, and contains nothing related to Watergate or anything connected therewith. In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or any Subordinate Officer, Official or Employee with Custody or Control of Certain Documents or Objects, Misc. No. 47-73, Order (D.D.C. Dec. 19, 1973) at p. 3.

There the District Court actually scrutinized in camera the tape that the Committee now only speculates it might need. The District Court clearly found the material unrelated to Watergate matters. In light of this finding, the Committee's argument on completeness and accuracy is contradicted by the facts and thus totally lacking in merit.

In any event, the Committee has no legitimate legislative need for the actual tapes. In order to prohibit an act it is not necessary to know whether an individual has, in fact, done the act. Rather we ask whether the action in question is of a kind that should be prohibited. In applying this principle, the Committee's legislative task is simple: to draft general standards, not to find specific instances of guilt. This last function the Constitution has delegated to the Judicial Branch. As emphasized by Chief Justice Warren, speaking for the majority, in Quinn v. United States, 349 U.S. 155, 161 (1955):

Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.

The Committee's real concern and sole responsibility is, in the words of Senate Resolution 60 of the 93rd Congress, which established the Committee (J.A. 12):

[t]o determine whether in its judgment any circumstance which may be revealed by the investigation and study indicate the necessity or desirability of enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen.

At page 4 of its Memorandum in Response the Committee asserts "that the entire tape recording of [the February 28] conversation was given the Special Prosecutor and the House Judiciary Committee by the President without any claim that parts of the conversation were not related to their inquiries." However, the Committee's position is not analogous to that of the grand jury or the House Judiciary Committee for it has failed to show it has a compelling need or that it is functioning as a quasi-judicial forum with a constitutional responsibility to adjudicate questions of guilt or innocence.

As a practical matter, disclosure to the Special Prosecutor for grand jury use, with its traditional secrecy, and to the House Judiciary Committee, which has established guidelines for maintaining confidentiality, and has yet to breach those guidelines, is fundamentally and substantially

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4/

different from disclosure to the Select Committee or the public at large. In this regard, this Court in Nixon v. Sirica, ___ U.S. App. D.C. ___, 487 F. 2d 700 (1973), stated:

We acknowledge that wholesale publication of Executive deliberations and documents would cripple the Executive as a co-equal branch.
487 F. 2d at 715.

It would be anomalous indeed if surrender of the actual tapes to the grand jury, because of its unique and compelling need, and voluntary disclosure of them to the House Judiciary Committee, with its important constitutional role, were now to make them, as the Committee contends, fair game for the whole world.

It is also interesting to note that once again the Committee, in seeking "actual tapes or verified copies," (see p. 3 of Memorandum in

4/ In this regard this Court may take judicial notice of the most recent leak concerning a draft of the final report prepared by the staff of the Committee. See e.g., The Washington Post, May 9, 1974, P. A10, Col. 1. In this particular article it was reported:

A memo from chief committee counsel Samuel Dash to the committee members emphasizes that "this rough draft is part of the final report and is a staff draft -- not the committee report until the committee approves it."

Dash also emphasized in his memo the need for "very careful security of the draft submitted to you" because of the embarrassment to the committee if the draft report leaked.

Response) is now seeking relief which it not only did not seek in District Court, but specifically disclaimed to this Court in oral argument by asserting the Committee's willingness to accept copies. It now appears that "verification" has become the essence of the Committee's need, rather than the substance of the material itself, which was zealously sought in all earlier stages of this litigation. If, in fact, this is the Committee's new position then the subpoena should be directed to the party with the actual tapes.

At page 2 of its Memorandum in Response the Committee contends that it must "obtain these tapes so that it could fulfill its Constitutional duty to inform the public of the extent of corruption in the executive branch." What the Committee continually fails to perceive is that its informing function must be incident to a valid legislative purpose. In this regard the Supreme Court in Watkins v. United States, 354 U.S. 178 (1957), affirmed that:

No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. 354 U.S. at 187.

And, likewise, the Committee cannot legitimatize an improper purpose no matter how many times it utters spurious incantations about an unqualified informing function. As was stated by the Supreme Court in

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Watkins v. United States, 354 U.S. 178 (1956), "We have no doubt that there is no Congressional power to expose for the sake of exposure." 354 U.S. at 200. If exposure "for the sake of exposure" were constitutionally permissible, then the mere assertion of a Congressional caprice to obtain any information would nullify any claims of individual privacy, executive privilege or judicial confidentiality, thereby emasculating the Fourth Amendment and the Separation of Powers. Clearly, this position is untenable.

With the very hard and historic decision made by the President to bare the innermost workings of the Executive's decision making process to the American public by publishing the transcripts, the Committee has everything it could possibly need from the White House to fulfill its informing function by recommending curative legislation. All the factual material concerning the President's discussions with his aides, of the events commonly called Watergate, are presented in the published transcripts. All the facts needed to draft any possible type of corrective campaign legislation are now available to the Committee. The tapes themselves will add nothing to the Committee's ability to draft any such legislation. This was recognized by the District Court Judge when he found "[t]he five tapes at issue are sought principally for the light that they might shed on the President's own alleged involvement in the Watergate

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coverup." (J.A. 168). Again we must remind the Committee that since its legislative function is not to adjudicate guilt or innocence, it is no longer open to serious question that the actual tapes are not needed for the Committee to perform its legislative function. Moreover, the Committee cannot pervert its legitimate power of inquiry in aid of legislation into a tenuous need for the tapes by some bizarre convolution of logic.

Also, it should be emphasized that the District Court correctly distinguished the functions of this Committee, that of the House Judiciary Committee, and the Special Prosecutor when it stated:

[C]ongressional demands, if they be forthcoming, for tapes in the furtherance of the more juridical constitutional process of impeachment would present wholly different considerations.

* * *

"[A]llegations involving the President" are among those specifically assigned to the Special Prosecutor for investigation and, if appropriate, for prosecution. (J.A. 168).

That the Committee's purported need for the tapes to fulfill its informing function is more imagined and factitious than real and compelling is further evidenced by the fact that the proper forums for determining the credibility of witnesses and ultimately the guilt or innocence of individuals have the subpoenaed tapes, and will undoubtedly

use them in carrying out their respective tasks. Thus, even if there were any substance to the Committee's claim in this regard, it should be recognized that the public will be informed to an even greater extent during the course of trials prosecuted by the Special Prosecutor and the impeachment proceeding conducted by the House Judiciary Committee. The Committee recognized this fact when in its Motion for Expedited Briefing and Argument Schedule and Suggestion For Hearing En Banc filed in this Court on October 23, 1973, it stated the absence of a Special Prosecutor made:

[A]ll the more urgent a ruling in this case that would assist in exposing all aspects of the Watergate affair to public view. . . (pp. 5-6).

Because the Committee premised much of its informing function on the absence of a Special Prosecutor, it necessarily follows that this is now no longer a valid basis for the Committee's asserted need. This is especially true in light of the fact that the House Judiciary Committee, which also has the subpoenaed tapes, is now actively functioning.

Since there has been no legitimate legislative need shown by the Committee for the material, which this Court has affirmed to be "presumptively privileged," Nixon v. Sirica, 487 F. 2d 700, 717 (1973), the President's claim of privilege should not even be reviewed by the Court. For as this Court recently said in Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 463 F. 2d 788 (1971):

Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even in camera disclosure, . . . 149 U.S. App. D.C. at 389, 463 F. 2d at 792.

This is fully in accord with the holding of the United States Supreme Court in United States v. Reynolds, 345 U.S. 1 (1953), where the Court stated:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege. . . will have to prevail. 354 U.S. at 11.

Clearly the Committee does not need the tapes to complete its legislative task now that it has the transcripts. Prior to the disclosure of the transcripts the District Court found, "[i]t has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes. . ." (J.A. 166) It goes without saying that the Committee's lack of need is now even more obvious. In light of the recent disclosure of the transcripts by the President and of the constitutional limitations on the Committee's power to investigate in aid of legislation and the constitutional role of the House Judiciary Committee, this Court has even more reason to affirm the court below than it had when the

decision was made. C.I.R. v. Belridge Oil Co., 267 F. 2d 29, 295 (9th Cir. 1959); Continental Can Co. v. Horton, 250 F. 2d 637, 645 (8th Cir. 1957).

If this Court determines that the transcripts of the relevant portions of the subpoenaed tapes furnished to the Committee substantially satisfy and adequately fulfill the Committee's needs, as we submit they do, this Court may find the issue moot. This would be consistent with the long line of cases, beginning in Hayburn's Case, 2 Dall. (1 U.S.) 409 (1792), holding that the federal courts may not give advisory opinions. As Chief Justice Warren wrote for the Court, "it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" Flast v. Cohen, 392 U.S. 83, 96 (1968). Moreover, the Supreme Court has held that "moot questions require no answer." Missouri, Kansas, & Texas R. Co. v. Ferris, 179 U.S. 602, 606 (1900). The rationale for this holding is that mootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract propositions," United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920), quoting California v. San Pablo & Tulare R. Co., 149 U.S. 308 (1893).

The inability of the Federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." See, e.g., Powell v. McCormack, 395 U.S. 487, 496, n. 7 (1969); Sibron v. New York, 392 U.S. 40, 50; (1968); and Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3(1964). This principle was recently reaffirmed in DeFunis v. Odegaard, Slip. Op. No. 73-235 (Sup. Ct., April 23, 1974) at p. 3. Since the Committee's need has been fulfilled, there is no longer a real and substantial controversy before this Court. It is true here, as in Hall v. Beals, 396 U.S. 45, 48 (1969), and Diffenderfer v. Central Baptist Church, 404 U.S. 412, 415 (1972), that "[t]he case has * * * lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Accordingly, this appeal should be dismissed because of mootness.

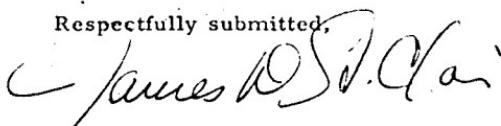
Conclusion

Since the District Court properly dismissed this suit finding that the Committee had failed in demonstrating a pressing need for the subpoenaed tapes, without even addressing the issue of compliance, in the light of subsequent events the District Court judgment is certainly

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not clearly erroneous and should be affirmed or, in the alternative, this appeal should be dismissed because of mootness.

Respectfully submitted,



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United States Senate

SELECT COMMITTEE ON
 PRESIDENTIAL CAMPAIGN ACTIVITIES
 (PURSUANT TO S. RES. 6, 93RD CONGRESS)

WASHINGTON, D.C. 20510

May 22, 1974

Hugh E. Kline, Clerk
 United States Court of Appeals
 for the District of Columbia Circuit
 United States Court House
 Washington, D.C.

RE: Senate Select Committee
v. Richard M. Nixon, No. 74-1258

Dear Mr. Kline:

The purpose of this letter is to inform the Court of Senate Resolution 327, passed yesterday, May 21, 1974, a copy of which is attached.

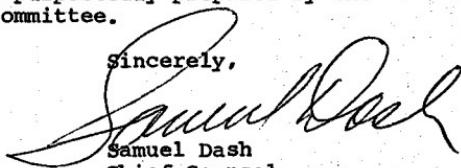
This resolution extends the date by which the Select Committee may file its final report until June 30, 1974. The resolution also, in effect, provides that the Select Committee shall continue to exist until the above-referenced lawsuit is concluded and that it may file an addendum to its final report if the lawsuit is resolved in its favor after that report is submitted.

Senators Ervin and Baker sought passage of this resolution in the belief that the Committee has a vital need for complete and accurate versions of the conversations sought in this lawsuit to complete the Committee's legislative missions; it appears even more strongly than before from the events of the past several days that the Committee does not now have such complete and accurate versions. See, e.g. Washington Post, Friday, May 17, A26-8, where the transcript of the September 15, 1972, meeting released

- 2 -

by the President is compared with a significantly different version purportedly prepared by the House Judiciary Committee.

Sincerely,



Samuel Dash
Chief Counsel
Attorney for Appellants

cc: James St. Clair, Counsel for Appellee
Leon Jaworski, Special Prosecutor
Attorney General William B. Saxbe

93^D CONGRESS
2D SESSION

S. RES. 327

IN THE SENATE OF THE UNITED STATES

MAY 20, 1974

MR. ERVIN (for himself and MR. BAKER) submitted the following resolution;
which was ordered to be placed on the calendar

MAY 21, 1974

Considered and agreed to

RESOLUTION

To extend the time of the Senate Select Committee on Presidential Campaign Activities for making its final report to the Senate, and for prosecuting its judicial action against the President for certain taped recordings.

- 1 *Resolved*, That section 5 of S. Res. 60, which was
- 2 adopted February 7, 1973, is hereby amended to read as
- 3 follows: "The select committee shall make a final report of
- 4 the results of the investigation and study conducted by it
- 5 pursuant to this resolution, together with its findings and such
- 6 legislative proposals as it deems necessary or desirable, to
- 7 the Senate at the earliest practicable date, but no later than
- 8 June 30, 1974. The select committee may also submit to
- 9 the Senate such interim reports as it considers appropriate.

1 After submission of its final report, the select committee
2 shall have three calendar months to close its affairs, and on
3 the expiration of such three calendar months shall cease to
4 exist: *Provided, however,* That in case the judicial action
5 brought by the select committee against the President to ob-
6 tain specified taped recordings of conversations in which the
7 President and his former aide, John W. Dean, participated is
8 not finally adjudicated before the expiration of such three
9 calendar months, the select committee shall continue in exist-
10 ence thereafter until thirty days subsequent to the occurrence
11 of one of these alternative events, namely, the judicial action
12 is finally adjudicated adversely to the select committee, or the
13 specified taped recordings are actually received by the select
14 committee pursuant to the final adjudication of such judicial
15 action or otherwise. In case the last event occurs, the select
16 committee is empowered to report to the Senate an adden-
17 dum to its final report setting forth findings and legislative
18 recommendations based on what the taped recordings
19 disclose.”.

93D CONGRESS
2D SESSION

S. RES. 327

RESOLUTION

To extend the time of the Senate Select Committee on Presidential Campaign Activities for making its final report to the Senate, and for prosecuting its judicial action against the President for certain taped recordings.

By Mr. ERVIN and Mr. BAKER

MAY 20, 1974

Ordered to be placed on the calendar

MAY 21, 1974

Considered and agreed to

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 74-1258

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES, ET AL, APPELLANTS

v.

RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES

Appeal from the United States District Court for the District of Columbia

Decided May 23, 1974

Samuel Dash, Chief Counsel, Senate Select Committee on Presidential Campaign Activities, with whom *Rufus Edmisten*, Deputy Counsel, *James Hamilton*, Assistant Chief Counsel, *Richard B. Stewart*, Special Counsel, *Ronald D. Rotunda*, Assistant Counsel, Senate Select Committee On Presidential Campaign Activities, *Sherman Cohn*, *Eugene Gressman* and *Jerome A. Barron* were on the brief for appellants.

Joseph J. Chester, with whom *Charles Alan Wright* was on the brief, for appellee. *George P. Williams* also entered an appearance for appellee.

Philip A. Lacovara, Counsel to the Special Prosecutor, with whom *Leon Jaworski*, Special Prosecutor and *Peter M. Kreindler*, Executive Assistant to the Special Prosecutor were on the brief for the Special Prosecutor as *amicus curiae*.

Irving Jaffe, Acting Assistant Attorney General, *Robert E. Kopp* and *Thomas G. Wilson* filed a brief on behalf of the United States as *amicus curiae*.

Before: *BAZELON*, *Chief Judge*, *WRIGHT*, *McGOWAN*, *LEVENTHAL*, *ROBINSON*, *MACKINNON*, and *WILKEY*, *Circuit Judges*

Opinion for the Court filed by *Chief Judge BAZELON*.

Concurring opinion filed by *Circuit Judge MACKINNON*.

Concurring opinion filed by *Circuit Judge WILKEY*.

BAZELON, Chief Judge: In this suit, the United States Senate Select Committee on Presidential Campaign Activities seeks a declaration that President Richard M. Nixon has a legal duty to comply with its subpoena *duces tecum*, directing him to produce "original electronic tapes" of five conversations between the President and his former Counsel, John W. Dean, III. By memorandum and order of February 8, 1974, the District Court for the District of Columbia denied the Committee's motion for summary judgment, and dismissed the suit without prejudice.¹ The Committee appeals. For the reasons stated herein, we affirm.

I.

The Select Committee was created on February 7, 1973, by a resolution of the Senate empowering the Committee to investigate "illegal, improper or unethical

¹ *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C. 1974).

activities" occurring in connection with the presidential campaign and election of 1972, and "to determine . . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen."² In testimony before the Committee on July 16, 1973, Alexander Butterfield, a former Deputy Assistant to the President, stated that certain presidential conversations, presumably including those about which Mr. Dean and others had previously testified, had been recorded on electronic tapes. The Committee thereupon attempted informally to obtain certain tapes and other materials from the President. When these efforts proved unsuccessful, the Committee issued the subpoena that is the subject of this appeal.³

This subpoena directed the President to make available to the Committee taped recordings of five conversations that had occurred on specified dates "between President Nixon and John Wesley Dean, III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972."⁴ The subpoena was duly served on the President, together with a second subpoena *duces tecum*, requiring production of all records that concerned, directly or indirectly, the "activities, participation, responsibilities or involvement" of twenty-five named persons "in any alleged criminal acts related to

² Senate Resolution 60, 93rd Cong., 1st Sess. § 1(a) (1973).

³ Section 3(a)(5) of Senate Resolution 60, *supra*, empowers the Committee:

* * * to require by subpoena * * * any department, agency, officer, or employee of the executive branch of the United States Government * * * to produce for its consideration or for use as evidence in its investigation and study any * * * tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control * * *.

⁴ Joint Appendix at 26-27.

the Presidential election of 1972.”⁵ Both subpoenas were returnable on July 26. By letter dated July 25, 1978, addressed to Senator Ervin as chairman of the Select Committee, the President declined to comply with either subpoena, asserting in justification the doctrine of executive privilege. The President stated that, although he had directed “that executive privilege not be invoked with regard to testimony by present and former members of [his] staff concerning possible criminal conduct,” executive privilege was being asserted with respect to “documents and recordings that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President.”⁶

The Committee, in its own name and in the name of the United States, then brought this action to enforce the subpoenas. It alleged in its complaint that “the subpoenaed electronic tapes and other materials are vitally and immediately needed if the Select Committee’s mandate and responsibilities . . . are to be fulfilled.”⁷ On August 29, the Committee filed a motion for summary judgment, seeking a declaration that the subpoenas were lawful and that the President’s refusal to honor them, on the ground of executive privilege or otherwise, was illegal. On October 17, the District Court dismissed the Committee’s action for want of statutory subject matter jurisdiction.⁸ The Committee appealed to this Court.

While the appeal was pending, the Senate on November 2 passed a resolution stating that the Select Committee

⁵ Joint Appendix at 29-33.

⁶ Joint Appendix at 35.

⁷ Complaint of the Senate Select Committee on Presidential Campaign Activities, et al., at 8; Joint Appendix at 8.

⁸ Senate Select Comm. on Presidential Campaign Activities, et al., v. Nixon, — F. Supp. — (D.D.C. 1973).

is authorized to subpoena and sue the President and that the Committee, in subpoenaing and suing the President, was acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions.⁹ The Select Committee asked this Court to hold its appeal in abeyance pending action on a bill, then before Congress, which conferred jurisdiction on the District Court for the District of Columbia in any civil action that the Committee theretofore or thereafter brought "to enforce or secure a declaration concerning the validity of any subpoena." This bill was enacted by Congress and, the President having failed to exercise his veto, took effect on December 19, 1973.¹⁰ On December 28, in light of this new jurisdictional statute, we remanded the case to the District Court for further consideration.¹¹

Following the remand, on January 25, 1974, the District Court issued an order quashing the Committee's subpoena concerning twenty-five individuals. The Court found the subpoena "too vague and conclusory to permit a meaningful response" and, referring to our intervening opinion in *Nixon v. Sirica*,¹² held the subpoena "wholly inappropriate given the stringent requirements applicable where a claim of executive privilege has been raised."¹³ No appeal was taken from this order and the matter is not before us.

At the same time, the District Court issued two orders concerning the subpoena of the five identified tapes. In

⁹ Senate Resolution 194, 93rd Cong., 1st Sess. (1973).

¹⁰ Pub. L. No. 93-190 (Dec. 19, 1973), to be codified as 18 U.S.C. § 1364.

¹¹ Order, No. 73-2086 (D.C. Cir., Dec. 28, 1973) (*en banc*).

¹² — U.S. App. —, —, 487 F.2d 700, 716-18 (1973).

¹³ Order, C.A. 1593-73 (D.D.C. Jan. 25, 1974); Joint Appendix at 148.

the first, the Court requested the Watergate Special Prosecutor to submit a "statement concerning the effect, if any, that compliance with [the subpoena] would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision."¹⁴ In the second order, finding the President's claim of executive privilege "too general and not sufficiently contemporaneous to enable the Court to determine the effect of that claim under the doctrine of *Nixon v. Sirica*," the Court requested the President to submit "a particularized statement addressed to specific portions of the subpoenaed tape recordings indicating whether he still wishes to invoke executive privilege as to these tapes and, with regard to those portions as to which the privilege is still asserted, if any, the factual ground or grounds for his determination that disclosure to the Select Committee would not be in the public interest."¹⁵ The President responded to this order by letter dated February 6, 1974. Rather than setting forth the particularized claims and reasons for which the District Court had called, the President reasserted executive privilege generally as to all of the subpoenaed material, citing as the bases for his claim the need for confidentiality of conversations that take place in the performance of his constitutional duties, and the possibly prejudicial effects on Watergate criminal prosecutions should the contents of the subpoenaed conversations become public.¹⁶ The latter concern was raised with reference to the President's constitutional duty to see that the laws are faithfully executed.

On February 8, the District Court entered the order at issue here. In the memorandum accompanying the

¹⁴ Order, C.A. 1593-73 (D.D.C. Jan. 25, 1973); Joint Appendix at 144.

¹⁵ Order, C.A. 1593-73 (D.D.C. Jan. 25, 1974); Joint Appendix at 139-140.

¹⁶ Joint Appendix at 162-63.

order, the Court dealt first with the President's assertion that the matter before it constituted a non-justiciable political question. Finding the reasoning of this Court in *Nixon v. Sirica*, which concerned a grand jury subpoena, "equally applicable to the subpoena of a congressional committee," the District Court held that, under that case and the relevant Supreme Court precedents, the issues presented to it were justiciable.¹⁷ The Court then turned, in the terms of *Nixon v. Sirica*, to a weighing of "the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance." The Court found, first, that the Select Committee had failed to demonstrate either "a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning those tapes will at this time serve the public interest." At the same time, however, the Court rejected the President's claim of privilege insofar as it was premised on the public interest in confidentiality, because, in its view, "the President's unwillingness to submit the tapes for the Court's *in camera ex parte* inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds."¹⁸ The Court then, in the discharge of its duty as a court of equity, undertook independently to weigh the public interest in safeguarding pending criminal prosecutions from possibly prejudicial pretrial publicity, against the Committee's asserted need for the subpoenaed tapes. In the particular circumstances of this case, including the fact that the tapes had already been made available to the June, 1972, grand jury of this district, the Court found it necessary to assign priority to the public interest in "the integrity of the

¹⁷ 370 F. Supp. at 522.

¹⁸ *Id.*

criminal process, rather than the Committee's need." It therefore dismissed the Committee's suit without prejudice.

II.

The Select Committee contends that, once having determined that the President's general confidentiality privilege failed, the District Court had no authority to engage in a balancing of interests, where the result was to pass judgment on the magnitude of need underlying the Committee's decision to authorize and issue a subpoena. Alternatively, the Committee argues that any such balancing must favor, as more urgently affected with the public interest, the Committee's asserted need over the public interest in the fairness of the criminal process. We find it unnecessary to reach either contention. Neither the Committee's position nor, if we read it correctly, that of the District Court accurately reflects the doctrines of *Nixon v. Sirica*, doctrines that, at least by analogy, we think controlling here.

In *Nixon v. Sirica*, we were confronted with a challenge to an order of the District Court, entered as a means of enforcing a grand jury subpoena, requiring the President to produce the subpoenaed items to enable the Court to determine by *in camera* inspection whether the items were exempted from disclosure by evidentiary privilege.¹⁹ In his challenge to this order, the President argued that the District Court had acted beyond its jurisdiction. He contended that he is absolutely immune in all cases from the compulsory process of the courts, and that whenever, in response to a grand jury subpoena, he interposes a formal claim of privilege, that claim without more disables the courts from inquiring by any means into whether the privilege is applicable. We rejected both contentions, holding, contrary to the President, that

¹⁹ 487 F.2d at 704.

at least with respect to grand jury subpoenas, it is the responsibility of the courts to decide whether and to what extent executive privilege applies.²⁰ And we held further that, generally, "application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."²¹

As in the present case, our attention in *Nixon v. Sirica* was directed solely to one species of executive privilege—that premised on "the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties."²² We recognized this great public interest, analogizing the privilege, on the basis of its purpose, "to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and . . . to that contained in the fifth exemption to the Freedom of Information Act."²³ We recognized, moreover, that protection of the presidential decision-making process requires a promise that, as a general matter, its confidentiality would not be invaded, even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment.

We concluded that presidential conversations are "presumptively privileged," even from the limited intrusion represented by *in camera* examination of the conversations by a court.²⁴ The presumption can be overcome

²⁰ 487 F.2d at 708-16.

²¹ 487 F.2d at 716.

²² 487 F.2d at 717.

²³ *Id.*

²⁴ 487 F.2d at 705, 717-18.

only by an appropriate showing of public need by the party seeking access to the conversations. In *Nixon v. Sirica*, such a showing was made by the Special Prosecutor:

[W]e think that this presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—evidence for which no effective substitute is available. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority.²⁵

We concluded that this strong showing of need was sufficient to overcome the general presumption of privilege premised on the public interest in the confidentiality of the presidential decision-making process. We held that it was within the power of the District Court "to order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the Court judges that the public interest served by non-disclosure of *particular* statements or information outweighs the need for that information demonstrated by the grand jury."²⁶ It became, therefore, incumbent

²⁵ 487 F.2d at 717 (citations omitted).

²⁶ 487 F.2d at 718.

upon the President to make particularized showings in justification of his claims of privilege, and upon the District Court to follow procedures, including *in camera* inspection, requiring careful deliberation before even the demonstrated need of the grand jury might be satisfied.²⁷

III.

The staged decisional structure established in *Nixon v. Sirica* was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations—we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired.²⁸ Contrary, therefore, to the apparent understanding of the District Court,²⁹ we think that *Nixon v. Sirica* requires a showing of the order made by the grand jury before a generalized claim of confidentiality can be said to fail, and before the President's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, together with particularized claims that the Court will weigh against whatever public interests disclosure might serve. The presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold with at least equal force here.

²⁷ 487 F.2d at 718-22.

²⁸ 487 F.2d at 722.

²⁹ See text and note at note 18, *supra*.

Particularly in light of events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision, we find that the Select Committee has failed to make the requisite showing. In its papers below and in its initial briefs to this Court, the Committee stated that it seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to "the extent of malfeasance in the executive branch," and, most importantly, the possible involvement of the President himself.³⁰ The Committee has argued that the testimony before it makes out "a *prima facie* case that the President and his closest associates have been involved in criminal conduct," that "the materials sought bear on that involvement," and that these facts alone must defeat any presumption of privilege that might otherwise prevail.³¹

It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing.³² The Congress learned this as to its own privileges in *Gravel v. United States*,³³ as did the judicial branch, in a sense, in *Clark v. United States*,³⁴ and the executive branch itself in *Nixon v. Sirica*. But under *Nixon v.*

³⁰ Brief of the Senate Select Committee, *et al.*, at 27-28.

³¹ *E.g.*, Supplemental Memorandum of the Senate Select Committee, *et al.*, at 2.

³² *Committee for Nuclear Responsibility v. Seaborg*, 149 U.S. App. D.C. 385, 463 F.2d 788, 794 (1971). See *Gravel v. United States*, 408 U.S. 606, 627 (1972).

³³ 408 U.S. 606 (1972).

³⁴ 289 U.S. 1 (1933).

Sirica, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal,³⁵ but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires, and our decision implies, no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.

In its initial briefs here, the Committee argued that it has shown exactly this. It contended that resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it "would aid in a determination whether legislative involvement in political campaigns is necessary" and "could help engender the public support needed for basic reforms in our electoral system."³⁶ Moreover, Congress has, according to the Committee, power to oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view. The Committee says that with respect to Watergate-related matters, this power has been delegated to it by the Senate, and that to exercise its power responsibly, it must have access to the subpoenaed tapes.³⁷

We turn first to the latter contention. In the circumstances of this case, we need neither deny that the Con-

³⁵ 487 F.2d at 718.

³⁶ Brief of Senate Select Committee, *et al.*, at 27-28.

³⁷ *E.g.*, Reply Brief of Senate Select Committee, *et al.*, at 21-23.

gress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source.³⁸ Moreover, so far as these subpoenaed tapes are concerned, the investigative objectives of the two committees substantially overlap: both are apparently seeking to determine, among other things, the extent, if any, of presidential involvement in the Watergate "break-in" and alleged "cover-up." And, in fact, the Judiciary Committee now has in its possession copies of each of the tapes subpoenaed by the Select Committee. Thus, the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees. We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee's subpoena.

The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.

³⁸ U.S. Const., art. I, § 2, ¶ 5.

While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in *Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable.³⁹ We see no comparable need in the legislative process, at least not in the circumstances of this case. Indeed, whatever force there might once have been in the Committee's argument that the subpoenaed materials are necessary to its legislative judgments has been substantially undermined by subsequent events.

By order of May 2, 1974, this Court took judicial notice of the President's public release of transcripts, with partial deletions, of each of the tapes at issue here. In light of the President's action we requested the Select Committee to file a supplemental memorandum stating whether the Committee "has a present sense of need for the materials subpoenaed" and, if so, in what specific respects the transcripts now available to the Committee, and to the public generally, are deficient in meeting that need. In its response to this order, the Committee states, first, that it needs access to the tapes in order to verify the accuracy of the public transcripts. In fact, however, the originals of four of the five tapes subject

³⁹ See 487 F.2d at 718.

to the Committee's subpoena have been transmitted by the President to the District Court, pursuant to that Court's order,⁴⁰ and are now in the District Court's possession. Thus, as the Committee's counsel acknowledged at oral argument, the subpoena now applies only to the copies of the tapes that remain in the President's possession. This being so, however, the Committee would encounter, in some measure, the same problem of verification with respect to four of the five tapes as it claims now to confront in the transcripts.

The Committee also says that certain portions of the conversations have been deleted from the transcripts, with notations that they contain material "unrelated to Watergate" or "unrelated to Presidential action,"⁴¹ and that, were the tapes played on highly sensitive equipment, portions that the transcripts designate as "inaudible" might be understood. Finally, the Committee argues that inflection and tone of voice that the tapes would supply are indispensable to a correct construction of the conversations. The Committee has, however, shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain. More importantly, perhaps, insofar as such ambiguities relate to the President's own actions, there is no indication that the findings of the House Committee on the Judiciary and, eventually, the House of Represent-

⁴⁰ See *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973)

⁴¹ Supplemental Memorandum of the Senate Select Committee in Response to this Court's Order of May 2, 1974, at 3.

atives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.

IV.

In approaching our judicial function, we have no doubt that the Committee has performed and will continue to perform its duties fully in the service of the nation. We must, however, consider the nature of its need when we are called upon, in the first such case in our history, to exercise the equity power of a court at the request of a congressional committee, in the form of a judgment that the President must disclose to the Committee records of conversations between himself and his principal aides. We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena. We therefore affirm the order dismissing the Committee's action without prejudice, although on grounds that differ from those announced by the District Court.

Affirmed.

MACKINNON, *Circuit Judge*, concurring: I concur in the result reached by the foregoing opinion but have some additional comments.

As I argued in dissent in *Nixon v. Sirica*, — U.S. App.D.C. —, —, 487 F.2d 700, 729-62 (1973), the President, as distinct from the executive establishment generally, possesses a constitutionally founded privilege enabling him to protect the confidentiality of conferences with his advisors. Recognition of that presidential privilege would dispose of the demands made by the instant subpoena, but failing majority consensus on this point I concur generally in the reasoning of the foregoing opinion as embracing an accurate analysis and sound application of the principles established in *Nixon v. Sirica*. This position evidences no retreat from my previously expressed views on the force, validity and importance of congressional subpoenas, *id.* at —, 487 F.2d at 737-38, nor does it reflect a comparatively higher esteem for judicial subpoenas. Rather, my concurrence today is premised on the basic proposition that enforcement of any subpoena, whether congressional or judicial, depends in the first instance upon an assessment of the immediate purpose, object and need which prompted its issuance. Thus, even though recognizing that the legislative function is no less important than the prosecutorial, I agree that the Senate Committee has failed to demonstrate a present need of sufficient urgency to overcome even the qualified presidential privilege recognized by the majority in *Nixon v. Sirica*. Additionally, while I would not characterize the Senate Committee's need as "merely cumulative," it bears particular emphasis that legislation involves a cooperative effort of both the House and the Senate, that the House Committee on the Judiciary already possesses the recordings sought here, and that these materials more than likely eventually will be released to the public.

WILKEY, Circuit Judge: On my own analysis our logical first conclusion should be that the constitutional principle of separation of powers makes the issue here a political question and therefore not justiciable (*Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1968); and *Nixon v. Sirica*, 487 F.2d 700, 762-99 (1973) (Wilkey, J., dissenting)); however, I agree that, taking the majority opinion in *Nixon v. Sirica* as still prevailing, Chief Judge Bazelon's opinion is likewise a sound basis for the action we take, and I therefore join therein without further reservation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, et al.,)
Plaintiff)
v.) Civil Action
FINANCE COMMITTEE TO RE-ELECT) No. 1780-72
THE PRESIDENT, et al.,)
Defendants) FILED

JAMES F. DAVEY, Clerk

STIPULATION

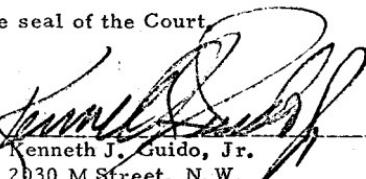
1. The members of the Senate Select Committee on Presidential Campaign Activities, or authorized staff representatives of the Select Committee, in pursuance of the responsibilities delegated to it by Senate Resolution 60 of the 93rd Congress, 1st Session may inspect and copy

(a) The records of organizations soliciting funds for
Richard M. Nixon from January 1, 1971 to April 7, 1972 delivered and
to be delivered to the Clerk of the United States District Court for the
District of Columbia, pursuant to the stipulation and order of said
Court entered on November 1, 1972;

(b) The depositions and documents taken and to be taken, pursuant to the order of this Court entered on October 17, 1972, as modified by orders of said Court entered on April 18, 1973, April 30, 1973, and May 16, 1973, whether said depositions are sealed or unsealed under prior order of this Court.

- 2 -

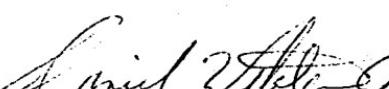
2. Neither the parties, the deponents, their counsel, nor the members of the Select Committee or its agents shall disclose, publicize, or publicly comment upon any of the testimony given or documents produced subject to the seal of the Court.



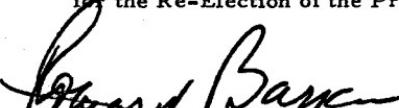
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Television Committee to Re-Elect
the President,
Radio Committee to Re-Elect the
President

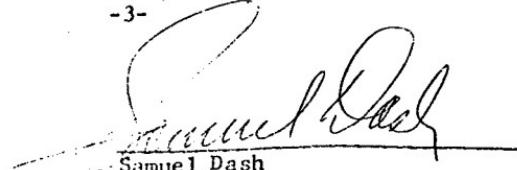


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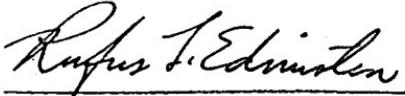
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Samuel Dash

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Deputy Counsel
Senate Select Committee on
Presidential Campaign Activities

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA~~CONFIDENTIAL~~

COMMON CAUSE, et al., ADSC 1373
)
Plaintiffs, JAMES E. DAVY, Clerk)
)
)
v.) Civil Action
THE PRESIDENT, et al.,) No. 1780-72
)
Defendants)

CONSENT ORDER

Upon the motion of the members of the Senate Select Committee on Presidential Campaign Activities, and the consent of the parties herein, pursuant to Rule 29 of the Federal Rules of Civil Procedure, it is by the Court this 24th day of

August, 1973.

ORDERED, that said motion be, and it is hereby, granted, and that with respect to records of organizations soliciting funds for Richard M. Nixon from January 1, 1971 to April 7, 1972 delivered and to be delivered to the Clerk of this Court, pursuant to the order of this Court entered on November 1, 1972, the Clerk of the Court be, and hereby is, ordered and directed to maintain, safeguard, and secure said records in a room under his control which shall be locked at all times except as shall hereinafter be provided:

(a) That at a suitable, convenient, and expeditious time to be determined by the Clerk, the Clerk shall permit the members or any authorized staff representatives of the Select Committee, to inspect and copy said records for use by the Committee in the duties assigned to it pursuant to Senate Resolution 60, 93rd Congress, 1st Session.

(b) All rights which the defendants, plaintiffs, and the Finance Committee for the Re-Election of the President may have in and to the records, documents, communications, and other writings which by this order have been impounded with the Clerk of the Court be, and they are hereby, preserved.

IT IS FURTHER ORDERED that with respect to depositions and documents, taken and to be taken herein, pursuant to the order of this Court entered on October 17, 1972, as modified by orders of this Court entered on April 18, 1973, April 30, 1973, and May 16, 1973,

(a) That the parties, the deponents, their counsel, and the Clerk of this Court, be, and hereby are ordered and directed to permit the members or any authorized staff representatives of the Select Committee, to inspect and copy said depositions and documents, whether sealed or unsealed under prior orders of this Court, for use by the said Committee in the duties assigned to it pursuant to Senate Resolution 60.

(b) That neither the parties, the deponents, their counsel, nor the members of the Select Committee or its agents shall disclose, publicize, or publicly comment upon any of the testimony given or documents produced subject to the seal of the Court, ~~except in~~

- 3 -

compliance with the preceding paragraphs of this ORDER, until further
order of the Court.
*K.W. Guido
July 17, 1976*

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., 618 Industrial Bank Building Providence, Rhode Island)	
BARUCH KORFF Rehoboth, Massachusetts)	
OLOF V. ANDERSON North Kingston, Rhode Island)	
P. HOYT FITCH 17 Irving Avenue Providence, Rhode Island)	
JOSEPH E. FERNANDES Norton, Massachusetts)	
THOMAS W. PEARLMAN 705 Industrial Bank Building Providence, Rhode Island)	
JOHN S. BOTTOMLY Cressbrook Farm Norfolk, Massachusetts 02056)	
VS.	Petitioners)
SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, U. S. Senate Office Building Washington, D. C.)	
SAM J. ERVIN, JR. U. S. Senate Office Building Washington, D. C.)	
HOWARD H. BAKER, JR. U. S. Senate Office Building Washington, D. C.)	
EDWARD J. GUERNY U. S. Senate Office Building Washington, D. C.)	
DANIEL K. INOUYE U. S. Senate Office Building Washington, D. C.)	
JOSEPH M. MONTOYA U. S. Senate Office Building Washington, D. C.)	

1758-73

CA No. _____

FILED
SEP 14 1973
JAMES F. DAVEY, Clerk

1758-73

17-6078

HERMAN E. TALMADGE)
U.S. Senate Office Building)
Washington, D. C.)

LOWELL P. WEICKER, JR.) ~~ENTITLED~~
U.S. House of Representatives)
Washington, D. C.) SEP 14 1973

Respondents)
JAMES E. DAVEY, Clerk

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

I. This petition for declaratory and injunctive relief arises under Senate Resolution 60 of the First Session of the Ninety-Third Congress and the Constitution of the United States, particularly Article I, Section 2, Paragraph 5 thereof, and Article I, Section 3, Paragraphs 5 and 6 thereof, and Article I, Section 8 thereof, and Article III, Section 2, Paragraph 3 thereof, and Article V of the Articles of Amendment thereof, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars. This Court has jurisdiction of this action under 28 U.S.C. § 1331, 1343(4), and 2201 and 2202.

Parties

2. Petitioner National Citizens' Committee For Fairness To The

Presidency, Inc. (hereinafter at times referred to as The Fairness Committee) is a non-profit, non-partisan corporation organized under and chartered by the laws of the State of Rhode Island to educate the public to United States traditional and constitutional processes and procedures intended to assure fairness to all United States citizens, to inculcate justice and patriotism, and to advance and promote civic, charitable, educational, constitutional, non-profit causes, and to take any and all lawful actions to implement and support those general purposes. The first meeting of the incorporators of the Fairness Committee was held on July 27, 1973. The Fairness Committee now has more than sixteen thousand (16,000) sponsor-members and in excess of twenty-five thousand (25,000) supporting members. A sponsor member is a person who has contributed money or services to the Fairness Committee to pay for and promote its activities. A supporting member is a person who has authorized in writing the Fairness Committee to inform the world in such manner as it deems appropriate that said person supports the purposes and the activities of the Fairness Committee. The members of the Fairness Committee total more than forty thousand (40,000) as of the date of the filing of this petition. In accordance with its charter and by-laws the Board of Directors of the Fairness Committee at a duly called and convened meeting at which a quorum was present throughout unanimously voted to authorize and direct the officers and counsel of the Fairness Committee to bring this Petition for and in the name of the corporation in its own right and in its capacity as a representative of its members as they are members of the classes hereinafter described.

3. Petitioner Baruch Korff (hereinafter referred to as KORFF) is a citizen of the United States of America (hereinafter at times referred to as USA), resident in the Town of Rehoboth, Commonwealth

of Massachusetts (hereinafter referred to as MASS.), USA, and is an incorporator, director and sponsor-member of the Fairness Committee.

4. Petitioner Olof V. Anderson (hereinafter referred to as ANDERSON) is a citizen of the USA, resident in the Town of North Kingston, State of Rhode Island (hereinafter referred to as RI), USA, and is an incorporator, director and sponsor-member of the Fairness Committee.

5. Petitioner P. Hoyt Fitch (hereinafter referred to as FITCH) is a citizen of the USA; resident in the City of Providence, RI, USA, and is an incorporator, director and sponsor-member of the Fairness Committee.

6. Petitioner Joseph E. Fernandes (hereinafter referred to as FERNANDES) is a citizen of the USA, resident in the Town of Norton, MASS., USA, and is an incorporator, director and sponsor-member of the Fairness Committee.

7. Petitioner Thomas W. Pearlman (hereinafter referred to as PEARLMAN) is a citizen of the USA, resident in the City of Providence, RI, USA, and is an incorporator, director and sponsor-member of the Fairness Committee.

8. Petitioner John S. Bottomly (hereinafter referred to as BOTTOMLY) is a citizen of the USA, resident in the Town of Norfolk, MASS., USA, and is a sponsor-member of the Fairness Committee.

9. Petitioners KORFF, ANDERSON, FITCH, FERNANDES and PEARLMAN, as they are officers and directors of petitioner Fairness

Committee, have been informed, believe and aver that all sponsor-members and all supporting members of the Fairness Committee are citizens of the United States of America.

10. KORFF, ANDERSON, FITCH, FERNANDES, PEARLMAN and BOTTOMLY petition this Honorable Court as they are members of that class of persons known as Citizens of The United States of America, for themselves, individually and collectively, for the members of the Fairness Committee as they are officers and directors thereof, and for and on behalf of all members of said class of persons known as United States citizens and by virtue thereof entitled as individuals and as members of said class of persons to the privileges, processes, protections, and rights created by and enumerated in the Constitution of The United States of America and by the laws duly enacted, executive orders duly promulgated, and judicial decisions duly made by the authority of said Constitution. Petitioner Fairness Committee and its members have a direct interest in the integrity and maintenance of the privileges, processes, protections and rights created by the United States Constitution, and in insuring compliance with legislation and judicial decisions enacted and made to preserve and protect the foregoing interests.

11. Respondent Senate Select Committee on Presidential Campaign Activities was created by Senate Resolution 60, considered, amended and agreed to on February 7, 1973 in the Senate of the United States during the First Session of the Ninety-Third Congress, and has its usual place of business in the Senate Office Building in the District of Columbia.

12. Respondent Sam J. Ervin, Jr. is a member of the Senate of the Ninety-Third Congress of the USA, from the State of North Carolina with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator ERVIN.

13. Respondent Howard H. Baker, Jr. is a member of the Senate of the Ninety-Third Congress of the USA from the State of Tennessee with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator BAKER.

14. Respondent Edward J. Guerney is a member of the Senate of the Ninety-Third Congress of the USA from the State of Florida with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator GUERNEY.

15. Respondent Daniel K. Inouye is a member of the Senate of the Ninety-Third Congress of the USA from the State of Hawaii with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator INOUYE.

16. Respondent Joseph M. Montoya is a member of the Senate of the Ninety-Third Congress of the USA from the State of New Mexico with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator MONTOYA.

17. Respondent Herman E. Talmadge is a member of the Senate of the Ninety-Third Congress of the USA from the State of Georgia with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator TALMADGE.

18. Respondent Lowell P. Weicker, Jr. is a member of the Senate of the Ninety-Third Congress of the USA from the State of Connecticut with an office in the Senate Office Building in the District of Columbia, USA, and is hereinafter referred to as Senator WEICKER.

Class Actions

19. Petitioners KORFF, ANDERSON, FITCH, FERNANDES, PEARLMAN and BOTTOMLY bring this action for declaratory and injunctive relief, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and all other members or classes of persons similarly situated. These classes consist of: (1) all citizens of The United States of America; and (2) all members of the Fairness Committee who are also members of the aforesaid class. Said classes of persons are so numerous that joinder is impractical; there are questions of law and fact presented herein which are common to the entire classes of persons identified above; the claims of petitioners KORFF, ANDERSON, FITCH, FERNANDES, PEARLMAN and BOTTOMLY herein are typical of the claims of said classes; and said Petitioners will fairly and adequately protect the interests of said classes. The respondents herein have acted on grounds generally applicable to the classes, thereby making appropriate declaratory and injunctive relief with respect to each class as a whole.

U.S. Senate Resolution 60, First Session, Ninety-Third Congress

20. On February 7, 1973, the Senate of the United States considered, amended, and agreed to the resolution submitted by Senator ERVIN on February 5, 1973, being S. RES. 60, which is hereby incorporated by reference in this Petition and constitutes an integral part hereof. A copy of said S. RES. 60 is appended to this Petition as Attachment No. 1 hereto. S. RES. 60 established the Select Committee on Presidential Campaign Activities (hereinafter referred to as the Senate Select Committee).

Operative Facts

21. In accordance with the provisions of Section 1 (b) and 1 (c) of S. RES. 60 the Respondents, Senators ERVIN, BAKER, GUERNY, INOUE, MONTOYA, TALMADGE, and WEICKER, were appointed as members of the Senate Select Committee with Senator ERVIN selected Chairman and Senator BAKER vice-chairman thereof.

22. The Select Committee has held and announced on September 12, 1973 that it proposes to hold additional public hearings to implement S. RES. 60.

23. The Select Committee established for itself as a part of its procedure that all witnesses required or volunteering to testify before the Select Committee be first interviewed by the staff of the Select Committee and that each member of the Select Committee be thereafter informed of the testimony to be given by each witness before said witness testified formally before the Select Committee in public or executive session.

24. As a result of the operation of the procedures established by the Respondents for the Select Committee as outlined in Paragraph 23. of this Petition, the Respondents knew or should have known when witnesses would give testimony alleging that individual citizens of the USA had engaged in criminal conduct.

25. In accordance with the mandate of Section 2 of S. RES. 60, and the rules of the Select Committee its members have interrogated individual witnesses under oath in public hearings about

- a) Allegedly criminal conduct of a witness; and
- b) Allegations of criminal conduct of persons other than the witness being questioned; and
- c) Allegations, circumstances, and opinions not within the direct personal knowledge of a witness; and
- d) Allegations of criminal conduct by persons other than

the witness on the basis of information not within the direct, personal knowledge of the witness being questioned.

26. The Respondents have admitted that the procedures and rules governing admission of testimony established by the Respondents for the Select Committee permit witnesses and may require witnesses, at the risk of being cited for contempt of the Senate, to testify about matters and circumstances not directly known to them, but in connection with allegations of criminal conduct by a citizen or citizens of the USA, other than such witnesses.

27. The Respondents failed to establish procedures for the Select Committee requiring or permitting the examination under oath of witnesses before the Select Committee, who in their testimony allege criminal conduct by a citizen or citizens of the USA, either by such citizen or citizens of the USA against whom such testimony is directed or by counsel of their choice on their behalf.

28. Respondents have authorized and required witnesses to testify at public hearings of the Select Committee about matters and in accordance with procedures set forth in Paragraphs 23, 24, 25, 26, and 27 of this Petition.

29. The public forum for the testimony described in Paragraphs 25, 26, and 29 of this Petition has included the simultaneous, unedited transmission of such testimony by television to any and all who may have or may have had the use of equipment capable of receiving and displaying the sounds and sights so transmitted.

30. As a result of the operation of the procedures established and practiced by the Respondents as set forth in Paragraphs 23 through 29 of this Petition, the Respondents knew or should have known that the order in which witnesses testified before public hearings of the Select Committee would effect materially the impact of such testimony on citizens of the United States of America.

31. As a result of the facts, procedures, and circumstances set forth in Paragraphs 23 through 30 of this Petition, and the selectively prejudicial testimony knowingly elicited from some witnesses by the operation thereof, the Respondents have deliberately and inequitably disrupted the domestic tranquility of the United States of America by undermining the confidence of citizens of the United States in the integrity of the administration of the Department of Justice and the Judiciary of the Government of the United States of America, to the damage of all citizens of the United States of America, wherever situated.

32. The manner in which the Select Committee has conducted its public hearings to date and its procedures, and the consequences as hereinabove set forth, were not necessary to and interfered with the proper discharge of the duty and authority of the Senate to conduct investigations and to hold hearings in the course of preparing and evaluating proposed or existing legislation.

Cause of Action

33. By their deliberate and coercive enforcement of the procedures established by them as set forth in Paragraphs 23 through 30 of this Petition, the Respondents have impaired and damaged the privileges, protections, and rights of citizens of the USA provided and guaranteed by the Constitution of the USA by

- a) Usurping on behalf of the Senate the power dele-

gated to the House of Representatives by Article I, Section 2, Paragraph 5 of the Constitution of the USA; and by

- b) Exceeding the powers delegated to the Congress in Article I, Section 8 of the Constitution of the USA; and by
- c) Usurping for the Senate the Judicial Power delegated to other divisions of government by Article II, Section 2, Paragraph 3 of the Constitution of the USA; and by
- d) Denying to citizens of the USA the protection and benefits established by Article III, Section 2, Paragraph 3 of the Constitution of the USA, thereby impeding the establishment of justice; and by
- e) Impairing the impartial and fair operation of Article I, Section 3, Paragraph 6 of the Constitution of the USA should the House of Representatives elect to exercise the power delegated to it by Article I, Section 2, Paragraph 5 of the Constitution of the USA; and by
- f) Nullifying the protection of rights conferred by Article V of the Articles of Amendment of the Constitution of the USA.

34. The diminution or impairment or violation by the Respondents of any of the privileges, protections, and rights of one citizen of the USA established and guaranteed by the Constitution of the USA creates a precedent which diminishes, impairs, and damages the privileges, protections, and rights of any and all members of that class of persons known as citizens of the USA.

35. The conduct of some of the members and some of the staff of the Select Committee during its many televised public hearings is more repetitive and theatrical than during executive sessions of the Select Committee, and results in the cost of entering the substance of testimony in the record during public hearings being greatly in excess of the cost of entering into the record the same substantive testimony in executive sessions of the Select Committee. As a result of the operation the announced procedures of the Select Committee set forth in Paragraph 23 hereinabove, substantive testimony in public hearings is in most cases a duplication of previous statements in closed sessions or to members of the staff of the Select Committee. The cost of operating the Select Committee is paid from the Treasury of the United States at the expense of citizens of the USA.

Absence or Inadequacy of Other Remedies

36. Respondents had the power and knowledge to establish the order in which witnesses have testified so as to minimize the results described in Paragraph 31 of this Petition. Respondents had the power to call Assistant Attorney General Henry Peterson as its first witness. Respondents did not so exercise their power to the damage of Petitioners and all other members of that class known as citizens of the United States. Petitioners therefore believe and aver that neither they nor other citizens of the USA have a legislative remedy available to prevent further damages arising from the procedures adopted and employed by the Respondents as the Select Committee.

37. Petitioners have no adequate remedy at law.

38. Continuance by the Respondents of the procedures and conduct hereinabove set forth will cause irreparable damage to the constitutional rights and privileges of the Petitioners and all persons in that class known as citizens of the USA.

Prayers For Relief

WHEREFORE, your Petitioners pray that this Honorable Court

1. Enjoin Respondents until further order of this Court from holding any public hearings of the Select Committee on Presidential Campaign Activities established by S. RES. 60 of the First Session of the Ninety-Third Congress; and
2. Enjoin the Respondents until further order of this Court from conducting any public hearings of the Select Committee on Presidential Campaign Activities established by S. RES. 60 of the First Session of the Ninety-Third Congress if the Respondents or members of their staff know or have reasonable cause to suspect that the testimony of a witness ordered or volunteering to appear before the Select Committee may include matters about which the witness has no direct knowledge; and
3. Enjoin the Respondents until further order of this Court from conducting any public hearings of the Select Committee on Presidential Activities established by S. RES. 60 of the First Session of the Ninety-Third Congress if the Respondents or members of their staffs know or have reasonable cause to suspect that the testimony of a witness ordered or volunteering to appear before the Select Committee may include allegations

of criminal acts by a specific person or persons of which such person or persons have not been convicted by a duly constituted Court of Law in conformity with the provisions of the Constitution of the USA or any State of competent jurisdiction; and

4. Enjoin the Respondents until further order of this Court as they are members of the Select Committee on Presidential Campaign Activities established by S. RES. 60 of the First Session of the Ninety-Third Congress from ordering or permitting any witness to testify before them in public hearing about allegations of criminal conduct by a person other than said witness without giving reasonable prior notice to such person about whom such allegations are expected to be made, or about whom Respondents have reasonable grounds to suspect may be made; and
5. Enjoin the Respondents until further order of this Court as they are members of the Select Committee on Presidential Campaign Activities established by S. RES. 60 of the First Session of the Ninety-Third Congress from ordering or permitting any witness to testify before them in public hearing about allegations of criminal conduct by a person other than such witness without authorizing immediate cross-examination of such witness by an attorney-at-law designated by such person about whom such allegations are expected to be made or about whom Respondents have reasonable cause to suspect may be made; and

6. Order speedy completion of the pleadings in this action; and
7. Designate an early date for oral argument and submission of written briefs by the parties hereto; and
8. Declare null and void Section 2 of S. RES. 60 of the First Session of the Ninety-Third Congress as it exceeds the authority of the Congress as set forth in Article I, Section 8 of the Constitution of the United States of America in that it directs a Committee of the Senate ". . . to reveal the full facts in respect to . . ." specific criminal conduct by particular individuals.
9. Declare null and void Section 2 of S. RES. 60 of the First Session of the Ninety-Third Congress as being in violation of Article III, Section 2, Paragraph 3 of the Constitution of the United States of America in that said Section 2 of S. RES. 60 directs a Committee of the Senate to exercise a Judicial power as set forth in said Paragraph of said Constitution by revealing the ". . . full facts in respect to . . ." specific criminal conduct by particular individuals.
10. Declare null and void Section 2 of S. RES. 60 of the First Session of the Ninety-Third Congress in that it violates Article V of the Articles of Amendment to the Constitution of the United States by directing a Committee of the Senate ". . . to reveal the full facts in respect to . . ." specific criminal conduct by particular individuals without

due process of law.

NATIONAL CITIZENS' COMMITTEE FOR
FAIRNESS TO THE PRESIDENCY, INC.,
BARUCH KORFF, OLOF V. ANDERSON,
P. HOYT FITCH, JOSEPH E.
FERNANDES, THOMAS W. PEARLMAN,
JOHN S. BOTTOMLY

By their Attorneys:

John S. Bottomly
John S. Bottomly

Stephen Leonard
Stephen Leonard

FEDERAL BLDG. B-109-
1915 "H" ST. N.W.

VERIFICATION OF PETITION WASH., D.C.
(602) 393-1565

The undersigned attorney for petitioners hereby swears that he is familiar with the subject of the petition in this action, that he had read the foregoing petition, and that, to the best of his knowledge, the factual allegations contained therein are true and correct.

John S. Bottomly
JOHN S. BOTTOMLY
Attorney for Petitioners

Sworn to before me this 14th day of September, 1973.

Maria W. Lee
Notary Public

My commission expires Jan 31, 1978.



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR
FAIRNESS TO THE PRESIDENCY, INC.
BARUCH KORFF
OLOV V. ANDERSON
P. HOYT FITCH
JOSEPH E. FERNANDES
THOMAS W. PEARLMAN
JOHN S. BOTTOMLY

1758-73

Petitioners : CA NO. _____

v.

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES
SAM J. ERVIN, JR.
HOWARD H. BAKER, JR.
EDWARD J. GUERNAY
DANIEL K. INOUYE
JOSEPH M. MONTOYA
HERMAN E. TALMADGE, and
LOWELL P. WEICKER, JR.

FILED

SEP 14 1973

JAMES F. DAVEY, Clerk

Respondents :

MOTION FOR PRELIMINARY INJUNCTION

and for

EARLY HEARING ON THE MERITS

1. Petitioners move this Court to issue a preliminary injunction pursuant to rule 65 of the Rules of Civil Procedure for the United States District Courts, and in support thereof states:

(a) Petitioners file herewith a verified petition for Preliminary Injunction and for other relief, as well

as a Memorandum of Points and Authorities in support of this Motion.

(b) A copy of all papers filed herein have been served upon Respondents, Senate Select Committee on Presidential Campaign Activities, Sam J. Ervin, Jr., Howard H. Baker, Jr., Edward J. Guerney, Daniel K. Inouye, Joseph M. Montoya, Herman E. Talmadge, and Lowell P. Weicker, Jr.

(c) As stated in the verified Petition, Respondents intend to hold public hearings of the Senate Select Committee on Presidential Campaign Activities in contravention of said Preliminary Injunction, beginning again on September 24, 1973.

(d) As further indicated in the said verified Petition, immediate and irreparable injury, loss and harm will thereby result to Petitioners and the ends of justice will be subverted before trial of this action can be had, unless a preliminary injunction order is entered against the Respondents.

(2) The issuance of a Preliminary Injunction will not adversely affect the legitimate interests of the Respondents.

(3) Petitioners herein, by their attorneys, further move this Court for an order setting a hearing on Petitioners' request for a Declaratory Judgment and Permanent Injunction at the earliest practicable date on the grounds that expedition will reduce cost, delay and will avoid permanent and irreparable

injury to Petitioners.

WHEREFORE, Petitioners pray the Court:

(a) To enter an Order in accordance with the Preliminary Injunctions attached hereto as Exhibits "A" through "E" and containing such other provisions as justice may require, and

(b) To grant Petitioners such other and further relief as justice may require.

John S. Bottomly

John S. Bottomly

Stephen Leonard

Stephen Leonard
Federal Bar Building
1815 "H" Street, N.W.
Washington, D.C. 20006
(202) 393-1565

UNITED STATES DISTRICT COURT

For The
DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE)
FOR FAIRNESS TO THE PRESIDENCY, INC.)
ET AL)
Petitioners)
VS.)
SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN PRACTISES ET AL)
Respondents)

1758-73

CA No. _____

MEMORANDUM IN SUPPORT OF MOTION OF PETITIONERS
FOR A PRELIMINARY INJUNCTION

EFILED

SEP 14 1973

JAMES F. DAVEY, Clerk

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Petitioners herein, by their attorneys, state in support of their motion for a Preliminary Injunction.

I. FACTS

This action was filed on Friday, September 14, 1973 by Petitioners as individual persons and as representatives of a class consisting of citizens of the United States of America. The Petition was filed in response to the announcement on September 12, 1973 of early resumption of public hearings on September 24, 1973 by the Senate Select Committee on Presidential Campaign Practises hereinafter referred to as Select Committee created on February 7, 1973 by Senate Resolution No. 60 of the First Session of the Ninety-Third Congress. Petitioners assert that said Senate Resolution No. 60 does not conform to the requirements of the United States Constitution. In addition and perhaps of more immediate concern are the practises and procedures of the Select Committee evidenced by its previous public hearings. The operation of these procedures has resulted in the Respondents knowing prior to its public hearings the testimony to be given by a witness at such hearings. The Respondents have admitted that notwithstanding such advance knowledge they have permitted and required witnesses to testify in public hearings about

- a) Alleged criminal conduct of a witness; and
- b) Allegations of criminal conduct of persons other than the witness; and
- c) Allegations, circumstances, and opinions not within the direct personal knowledge of a witness; and
- d) Allegations of criminal conduct by persons other than the witness on the basis of information not within the direct, personal knowledge of the witness.

Respondents have failed to establish procedures permitting examination under oath of witnesses before the Select Committee who allege criminal conduct by persons other than the witness, either by such other persons against whom such testimony is directed or by counsel of their choice on their behalf. The previous public hearings of the Select Committee have been televised in whole or in part on one or more national television networks. The deliberate enforcement of the procedures of the Select Committee has impaired and damaged the privileges, protections and rights of citizens of the United States provided and guaranteed by Articles I and III of the United States Constitution and Article V of the Amendments thereof.

The public hearings to date of the Select Committee have included frequent repetition by various Respondents of questions previously asked of the same witness, often with considerable attendant theatrics, so that the cost of obtaining information through public hearings is substantially greater than if it were gathered by staff interviews or in closed sessions.

II. NECESSITY OF EXPEDITIOUS RELIEF TO
AVOID IRREPARABLE HARM

Petitioners and all members of the classes they represent will suffer irreparable injury if this Court does not expeditiously grant the Motion of Petitioners for a Preliminary Injunction.

The further diminution or impairment or violation of any of the privileges, protections and rights of one citizen of the United States, established and guaranteed by the United States Constitution, creates

a precedent which diminishes, impairs, and damages the privileges, protections, and rights of all citizens.

The purpose of Congressional hearings is to obtain information to help the Congress evaluate existing and proposed legislation. That function must not be impaired. However, it also must not be allowed to, and indeed it need not, subvert clear language of the Constitution establishing procedures for impeachment and separation of powers. Nor should it override or ignore the rights of individual citizens. Achievement of the purposes of the Congressional power to investigate does not require it to avoid clear language of the Constitution or deny any individual the protection of Constitutional rights. Yet the record of public hearings to date of the Select Committee contains many examples of such consequences resulting from the manner in which the Respondents conduct those hearings. There has been no indication by Respondents that they have or intend to change those procedures which governed their prior public hearings. There is therefore every reason to believe that Respondents will continue to ignore certain Constitutional provisions and to transgress upon and irreparably damage the Constitutional rights of more citizens of the United States before an audience of millions of people who have not been and cannot be fully informed about all material and relevant facts.

III. THE RELIEF REQUESTED WILL NOT UNDULY BURDEN
THE RESPONDENTS

If this Court enters Orders granting requests of the Petitioners the substantive work of the Select Committee will not be impaired. In

fact the elimination of public hearings will expedite the work of the Select Committee and reduce the cost thereof to the taxpayers by eliminating repetitive and histrionic questioning and duplicate entries of the same substantive testimony into the records of the Select Committee.

In an interview by Reporter Leslie Stahl of CBS Television News, broadcast during the evening of September 12, 1973, Respondent Senator Guerney of Florida said in substance that the Select Committee could garner enough knowledge and facts from closed hearings and staff interviews to write the report required of the Select Committee.

IV. THE PETITIONERS HAVE STANDING TO
BRING THIS ACTION

Article III of the United States Constitution provides that Federal Constitutional Courts may only resolve questions arising from "cases" or "controversies." In order for a dispute to be justiciable by Federal Courts, the party who initiates the action must have "standing to sue." (See Flast v. Cohen, 392 U.S. 83 (1968)).

"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a Federal Court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues'" upon which the court must rely for the illumination of difficult questions.

Id., at 99.

Although the Court in Flast drew the distinction between the capacity of a particular party to request an adjudication of an issue and the capacity of the Court to adjudicate the issue itself, the court has more recently hedged a bit from this position - over the dissent of Justice Brennan.^{6/} In Association of Data Processing Service Organizations, Inc., et al v. Camp, et al, 397 U.S. 150 (1970), the Court held that in order for a plaintiff to have standing to sue it must be alleged that the plaintiff has suffered "an injury in fact" and that such injury must have arguably occurred within the "zone on interests" which the statute or regulation in question was designed to protect. Id., at 152-153.

In a recent decision concerning standing, the Supreme Court dealt with the question of what must be "alleged by persons who claim injury of a non-economic nature to interests that are widely shared." In Sierra Club v. Morton, 92 S. Ct. 1361 (1972), the Court reaffirmed two trends in the law of standing. First, it restated that injuries other than economic harm are sufficient to form the basis for a party's standing to seek redress for such injury in Federal Court. Id., at 1367-1368. Second, it reaffirmed that "an organization whose members are injured may represent those members in a proceeding for judicial review. Id., at 1368

See also Common Cause et al v. Finance Committee to Re-elect the President et al, USDC (D of C) CA No. 1780-72.

6. Justice Brennan argued in his dissent to Data Processing that the plaintiff need only meet the first test in order to have standing under Flast. Determination of whether the second test had been met, in Brennan's view, went to the merits of the case, and should therefore be postponed until all threshold questions had been resolved. Id., at 167-169

The members of the Fairness Committee and citizens of the United States have suffered an "injury in fact" and such injury has occurred within the "zone of interest" which the Constitution and Title 28, Section 1343(4) of the United States Code were designed to protect. Both standards of Association of Data Processing Service Organizations, Inc. et al v. Camp et al, 397 U.S. 150 (1970) are satisfied in the present case.

The purposes of 28 USC §1343(4) and the meaning of "due process" as it has evolved from Article V of the Articles of Amendment, U.S. Constitution are manifold. The intent of Article III, Section 2, Paragraph 3 of the U.S. Constitution manifestly is to provide definite procedural protections to individuals during ". . . a complete investigation and study of the activities of any and all persons or groups of persons or organizations of any kind which have any tendency to reveal the full facts in respect to. . ." [S. RES. 60, First Session, 93D Congress, February 7, 1973, page 3, Sec. 2, lines 18 through 2] the crimes listed in Sec. 2 of S. RES. 60, Id.

Respondents have violated the Constitutional and statutory rights of Petitioners and members of the class they represent by their refusal and failure to establish procedures guaranteeing to witnesses testifying before them about alleged criminal conduct or to persons about whom testimony of alleged criminal conduct is given to Respondents by others in public hearings the same privileges, protections and rights afforded by the Federal Courts, including, but not limited to confrontation by an accused of an accuser, cross-examination of an accuser by an accused, and the exclusion of public testimony by a witness about matters not within the direct personal knowledge of the witness, and the exclusion of motion picture, still and television cameras during any such hearings.

Petitioners and every member of the class they represent are threatened with injury in fact because if Respondents continue to conduct public hearings as they have in the past without the procedural and evidentiary protections afforded by judicial proceedings any and all Committees of Congress can at any time violate the Constitutional and Statutory rights of any citizen of the United States without recourse.

Absent resolute and definitive action by this Court by granting the Motion of Petitioners for Preliminary Injunctions the rights, privileges and reputation of any member of that class made up of citizens of the United States can and may be destroyed at the whim of a majority vote of Respondents without prior notice or any means for effective refutation or defense.

Petitioners Fairness Committee, Korff, Anderson, Fitch, Fernandes, Pearlman and Bottomly do not fall within the pitfall of the Sierra Club majority opinion because the gravamen of their complaint is the injury to the membership of the Fairness Committee and to the class of persons represented by the other individual Petitioners. The "personal stake in the outcome" test of Flast v. Cohen, the "zone of interest" standard of Data Processing, and the Sierra Club test of suffering an injury in fact having all been met the Petitioners have standing to maintain this action. See also Common Cause et al v. Democratic National Committee et al, 333 F. Supp. 803 (D.C.D.C. 1971) and Common Cause et al v. Finance Committee to Re-Elect the President et al. (D.C.D.C. Civil Action No. 1780-72)

V.

CONCLUSION

For all of the foregoing reasons Petitioners respectfully request that the Court issue:

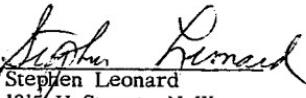
- (A) The Preliminary Injunctions restraining the Respondents, their agents, employees, and all others in active concert with them from doing or performing any or all of the following acts:
- (1) Holding any public hearings of the Select Committee on Presidential Campaign Activities established by Senate Resolution 60 of the First Session of the Ninety-Third Congress; and
- (2) Holding, conducting, causing to be held and/or conducted any public hearings of the Select Committee on Presidential Campaign Activities established by Senate Resolution 60 of the First Session of the Ninety-Third Congress when and if the Respondents or their agents, servants, employees, attorneys and/or other persons in active concert or participation with said Respondents know or have reasonable cause to suspect that the testimony of a witness ordered or volunteering to appear before the Select Committee may include matters about which the witness has no direct knowledge; and

- (3) Conducting any public hearings of the Select Committee on Presidential Campaign Activities established by Senate Resolution 60 of the First Session of the Ninety-Third Congress if the Respondents or any of them, their agents, servants, employees, attorneys, and/or other persons in active concert or participation with said Respondents know or have reasonable cause to suspect that the testimony of a witness ordered or volunteering to appear before the Select Committee may include allegations of criminal acts by a specific person or persons of which such person or persons have not been convicted by a duly constituted Court of Law in conformity with the provisions of the Constitution of the United States of America or of any State of competent jurisdiction; and
- (4) Ordering or permitting any witness to testify before said Respondents in public hearing about allegations of criminal conduct by a person other than such witness without authorizing immediate cross-examination of such witness by an attorney-at-law designated by such person about whom such allegations are expected to be made or about whom Respondents have reasonable cause to suspect may be made; and

- (5) Ordering, causing to be ordered, permitting or causing to be permitted any witness to or from testifying before said Respondents in public hearing about allegations of criminal conduct by a person other than said witness without giving reasonable prior notice to such person about whom such allegations are expected to be made, or about whom Respondents have reasonable grounds to suspect may be made; and
- (B) An Order setting a hearing on request of Petitioners for declaratory judgment and permanent injunctions at the earliest, practicable date.

Respectfully submitted,


John S. Bottomly
Bottomly Office
Box 301
Millis, Massachusetts 02054


Stephen Leonard
1815 H Street, N.W.
Washington, D.C. 20006

CIVIL SUPPOENA

United States District Court
for the
District of Columbia

NATIONAL CITIZENS' COMMITTEE FOR
 FAIRNESS TO THE PRESIDENCY, INC., et al
Plaintiff.

SENATE SELECT vs. COMMITTEE ON PRESI- CIVIL ACTION NO. 1758-73
 DENTIAL CAMPAIGN ACTIVITIES, et al
Defendant.

To: Senate Select Committee on Presidential Campaign Activities
 (serve Hon. Sam J. Ervin, Jr., Chairman)

YOU ARE HEREBY COMMANDED to appear in (this court) ~~(Date)~~

to give testimony in the above-entitled cause on the 20th day of September, 19 73,
 at 2:30 o'clock P. m. (and bring with you)

See Attachment hereto which is made a part hereof

and do not depart without leave.

ROBERT M. STEARNS, Clerk

By *Stephen Leonard*

Deputy Clerk.

Date September 18, 1973

Stephen Leonard, Federal Bar Bldg.
 1815 "H" St., N. Attorney for *Plaintiff.*
 Washington, D. C. *Defendant.*

20006

RETURN ON SERVICE

Tel. (202) 393-1565
 Summoned the above-named witness by delivering a copy to him and tendering to him the fees
 for one day's attendance and mileage allowed by law, on the _____ day of _____,
 19____, at _____

Dated _____

Subscribed and sworn to before me, a _____ this _____ day of
 _____, 19_____

NOTE.—Affidavit required only if service is made by a person other than a U. S. Marshal or his deputy.

CIVIL SUBPOENA - UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ATTACHMENT TO:

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., et al

CIVIL ACTION NO. 1758 - 73

v.

SENATE SELECT COMMITTEE ON PRESIDENTIAL ACTIVITIES, et al

(and bring with you)

1. Any and all records, memoranda and transcripts of conferences and discussions (formal and informal) and testimony relating to deliberations, considerations, discussions and determinations by Defendant Committee regarding procedures to be employed by Defendant Committee pursuant to Title 2 United States Code, Sec. 190 a-1. and in particular Title 2 United States Code, Sec. 190 a-1(b).
2. A copy of the written statement of proposed testimony of John W. Dean III filed with the Clerk of Defendant Committee and the digest thereof prepared by the staff of Defendant Committee pursuant to Title 2 United States Code, Sec. 190 a-1. (c).
3. Any and all records, memoranda and transcripts of conferences and discussions (formal and informal) and testimony relating to deliberations, considerations, discussions and determinations by Defendant Committee and its members and others:
 - (a) relating to or concerning the relationship between the House of Representatives and the Senate regarding the sole power delegated to the House of Representatives for impeachment granted by Article I, Section 2 of the Constitution and the sole powers granted to the Senate pursuant to Article I, Section 3 of said Constitution,
 - (b) relative to the relationship of the proceedings of the Defendant Committee and the Judicial Branch of the United States of America concerning the possible interference of proceedings of the Defendant Committee with Article III, Section 2 of the Constitution of the United States, and
 - (c) providing for the protection of the rights of witnesses and any other persons under due process of law as set forth in Article 5 of the Articles in Addition to and Amendment of the Constitution of the United States of America.

NUMBER
561

STEPHEN LEONARD
408 FEDERAL BAR BLDG.
WASHINGTON, D. C. 20006

DATE

9/18

1973

15-3/540

DAY
TO THE
ORDER
OF

SAM J. ERVIN, JR.

\$20.80

TWENTY DOLLARS AND 80/100

DOLLARS

The RIGGS NATIONAL BANK
of WASHINGTON, D. C.
FEDERAL OFFICE
1750 PENNSYLVANIA AVENUE, N. W.

Stephen Leonard

WITNESS FEE

10540-000031-11-030867571

THE FALCONER COMPANY

1801

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED SEP 20 1973

JAMES F. DAVEY
CLERK

NATIONAL CITIZENS' COMMITTEE FOR
FAIRNESS TO THE PRESIDENCY, INC., et al

Plaintiffs

v.

SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, et al

Defendants

Civil Action
No. 1758-73

MOTION TO POSTPONE RESPONSE TO SUBPENA

Defendant Select Committee, by its attorneys, hereby moves the Court to postpone defendant's response to the subpoena of plaintiff dated September 18, 1973, until October 19, 1973. The reasons for this motion are set out in the accompanying Memorandum in Support of Motion To Postpone Response to Subpnea.

Respectfully submitted,

Samuel Dash
Chief Counsel

Fred D. Thompson
Minority Counsel

Rufus Edmisten
Deputy Counsel

James Hamilton
Assistant Chief Counsel

Richard B. Stewart
Special Counsel

Donald S. Burris
Assistant Counsel

William T. Mayton
Assistant Counsel

Ronald D. Rotunda
Assistant Counsel

United States Senate
Washington, D. C. 20510
Telephone Number 225-0531
Attorneys for Plaintiffs

Sherman Cohn
Eugene Gressman
Jerome A. Barron
Washington, D.C.
of Counsel

Arthur S. Miller
Chief Consultant to
the Select Committee
of Counsel

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., et al)	
)	
)	
Plaintiffs)	
)	
v.)	Civil Action
)	No. 1758-73
SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, et al)	
)	
)	
Defendants)	

MEMORANDUM IN SUPPORT OF MOTION
TO POSTPONE RESPONSE TO SUBPENA

On September 19, 1973, only two days after defendant Select Committee was served with the complaint in this case, plaintiff served a subpoena on the Select Committee that, on its face, seeks both testimony and the production of records. The present motion asks for postponement of defendant's response to this subpoena until October 18, 1973.

The Select Committee and the seven Senator defendants in this case will file tomorrow, September 21, a motion to dismiss this case. We hope this motion can be resolved before the date we have suggested for response to this subpoena, October 19, 1973. If the motion is resolved in defendants' favor --- as we have every reason to believe it will be --- response will not be required.

In any event, postponing response to October 19 will give defendant adequate time to determine how to respond. A 30 day extension is hardly an unreasonable request. This subpoena principally seeks the production of certain records assertedly held by the Select Committee.

The normal method for production of such documents would be to serve a request to produce under Rule 34 on defendant. Under that rule a defendant usually has 30 days from the request to respond, but need not respond until 45 days from service of the complaint has elapsed. The use of Rule 45 in this case to avoid the timing provisions of 34 is improper. We do not insist on the 45 days from service of the complaint allowed defendant by Rule 34, but do feel that a 30 day period --- to October 19 --- is appropriate and fair.^{*/}

Respectfully submitted,

Samuel Dash
Chief Counsel

Fred D. Thompson
Minority Counsel

Rufus Edmisten
Deputy Counsel

James Hamilton
Assistant Chief Counsel

Richard B. Stewart
Special Counsel

Donald S. Burris
Assistant Counsel

William T. Mayton
Assistant Counsel

Ronald D. Rotunda
Assistant Counsel

United States Senate
Washington, D. C. 20510
Telephone Number 225-0531

Attorneys for Plaintiffs

Sherman Cohn
Eugene Gressman
Jerome A. Barron
Washington, D. C.
of Counsel

Arthur S. Miller
Chief Consultant to
the Select Committee
of Counsel

*/ The subpoena also asks for defendant "to give testimony". This request, in effect, is a notice of deposition. The taking of depositions is governed by Rule 30, which provides that a defendant cannot be served with a notice of deposition until 30 days after the service of the complaint. This time, of course, has not elapsed. Moreover, Rule 30 also states that "reasonable notice of a deposition" shall be given. Local Rule 1-16(b) instructs that five days constitutes reasonable notice. Thus the subpoena we received on September 19 asking for testimony on September 20 does not provide reasonable notice.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR)
FAIRNESS TO THE PRESIDENCY, INC., et al)
Plaintiffs)
v.) Civil Action
SENATE SELECT COMMITTEE ON PRESIDENTIAL) No. 1758-73
CAMPAIGN ACTIVITIES, et al)
Defendants)

ORDER

This matter having come before the Court on defendant Select Committee's motion to postpone response to plaintiffs' subpoena dated September 18, 1973, until October 19, 1973, it is hereby this _____ day of September, 1973,

ORDERED that defendant's motion be and is granted and that defendant need not respond to said subpoena until October 19, 1973.

June L. Green
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

5 NATIONAL CITIZENS' COMMITTEE FOR)
FAIRNESS TO THE PRESIDENCY, INC. et. al.)
6)
7 vs.) CA No. 1758-73
8)
SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES et. al.)

MEMORANDUM IN OPPOSITION TO MOTION OF
DEFENDANT TO POSTPONE RESPONSE TO SUBPENA

The Senate Select Committee on Presidential Campaign Activities (Senate Select Committee) announced on September 12, 1973 that it would resume public hearings on September 24, 1973.

The Petition in this action was filed in the morning of September 14, 1973. During the early afternoon of that day the Clerk of the Court informed counsel for the Petitioners that the Chief Judge of the United States District Court for the District of Columbia (U.S.D.C.D.C.) had previously issued a general instruction that he wished to examine any initial pleadings in cases arising from the hearings or activities of the Senate Select Committee. During the same conversation the Clerk of Court also informed counsel for the Petitioners that Chief Judge Sirica would not be able to examine the initial

1 pleadings in this case until Monday, September 17, 1973 at the
2 earliest.

3 In response to inquiry on Tuesday, September 18, 1973
4 counsel for Petitioners were informed by the Clerk of Court
5 that this case had been assigned to the Honorable June L. Green.
6 Contact was made as soon as possible with the Clerk for Judge
7 Green. In due course counsel for Petitioners were informed
8 orally that the hearing on their Motion for Preliminary Injunction
9 had been set for 3:00 p.m., Thursday, September 20, 1973.
10 Counsel for Petitioners immediately caused to be issued and
11 served on Respondents Senate Select Committee and the Honorable
12 Sam J. Ervin, Jr., Chairman the Subpena response to which
13 Respondents have moved to postpone. The Subpena was dated
14 September 18, 1973 and was returnable at 2:30 p.m., Thursday,
15 September 20, 1973, that is thirty minutes before the hour when
16 counsel for Petitioners, at the time the Subpena was issued,
17 believed their Motion for Preliminary Injunction was to be
18 heard.

19 The Subpena was issued under Rule 45(a) and 45(b) and
20 45(e). It is essential to a full and fair hearing on the
21 Motion of Petitioners for Preliminary Injunctions that the
22 documents requested in the September 18, 1973 Subpena and that
23 a Respondent able to testify about the contents and authenticity
24 thereof be available to the court and to the Petitioners at
25 that time. Trial of an issue of fact necessitates opportunity

1 Injunction had been postponed to 2:00 p.m., Friday, September
2 21, 1973. On the same day counsel for Petitioners were served
3 with the Motion against the allowance of which this memorandum
4 is directed and were informed that Respondents will file a
5 Motion to Dismiss on Friday, September 21, 1973 for argument at
6 2:00 p.m. on that day.

7 Not notwithstanding the validity and continuing force of the
8 September 18, 1973 Subpena, hereinabove described, counsel for
9 Petitioners have caused to be issued and served on Respondents
10 Senate Select Committee and Hon. Sam J. Ervin, Jr., Chairman
11 an identical Subpena except that it is returnable at 1:30 p.m.,
12 Friday, September 21, 1973. With the service of this Subpnea,
13 as was the case when the September 18, 1973 Subpnea was served,
14 Petitioners caused Respondent Ervin to be paid the witness fees
15 and mileage required by Rule 45(c).

16 The Memorandum in Support of Motion to Postpone Response
17 to Subpnea (Respondent Memorandum) submitted by Respondents
18 asserts that Petitioners must rely on Rule 34 for the production
19 of documents. In effect Respondents argue that Rule 45(e)(1) is
20 a nullity, and that it is not available to Petitioners.

21 Respondent Memorandum also incorrectly asserts that
22 Petitioners caused the September 18, 1973 Subpnea to issue only
23 to circumvent the Rules governing discovery by deposition.

24 Had discovery and production of documents under Rule 34
25 been the intent of Petitioners they wiould have filed a Motion

1 for Early Discovery.

2 Respondent Memorandum states: "In any event, postponing
3 response to October 19 will give defendant adequate time to de-
4 termine how to respond." During the afternoon of Wednesday,
5 September 19, 1973 counsel for Respondents informed counsel for
6 Petitioners that they would file a Motion to Quash the Subpena
7 on the ground that the information, records and documents re-
8 quested are "confidential". Disallowance of the Motion to
9 Postpone Response to Subpena will not deprive Respondents of
10 the right to file and Motion to Quash the Subpena under Rule
11 45(b).

12 It is also appropriate to note that some published reports
13 have indicated that the Respondent Senate Select Committee may
14 well expect and hope to make this action meet on or before
15 October 19, 1973 at least insofar as it seeks to enjoin public
16 hearings by the Senate Select Committee.

17 Production of the documents required by these Subpenae
18 of the Petitioners is not unreasonable or oppressive. The
19 subject matters to which the documents relate have been
20 described with specificity. The Respondents have a large and
21 highly skilled staff. Routinely their deliberations are
22 recorded by stenotypists and transcribed into typewritten form
23 immediately thereafter. It is not unreasonable to believe that
24 the professional staff of Respondents has caused their files
25 and records to be organized by subjects in a manner which makes

1 the production of the records requested a matter of adminis-
2 trative routine.

3 At all times during the pendency of this case and since
4 they were formally served on Monday, September 17, 1973 Respond-
5 dents knew that they intended to resume public hearings of the
6 Senate Select Committee on Monday, September 24, 1973.
7 Respondents have known since Monday, September 17, 1973 that the
8 first, immediate objective of Petitioners is to obtain Orders
9 from this Court enjoining, temporarily at least, the resumption
10 of those public hearings of the Senate Select Committee for the
11 reasons more fully set forth in the Petition in this case and the
12 accompanying Memorandum in Support of Motion for Temporary
13 Injunction.

14 It has been the rule in the District of Columbia since
15 Perry v. Perry, 88 U.S. App. D.C. 337, 190F, 2d 601 (1951) that:

16 "[w]hen a motion for Preliminary Injunction is
17 presented to a court in advance of hearing on
the merits, it is called upon to exercise its
18 discretion upon the basis of a series of es-
timates: the relative importance of the rights
asserted and the acts sought to be enjoined, the
19 irreparable nature of the injury allegedly
flowing from denial of preliminary relief, the
probability of the ultimate success or failure
of the suit, the balancing of damage and con-
20 venience generally" " Perry v. Perry, 88 U.S.
App. D.C. at 338, 190 F.2.d at 602

22 This Court will be unnecessarily and seriously hampered
23 in making such a "series of estimates" if it does not have
24 available to it the documents and records of the Respondents
25 requested by the Subpenae of Petitioners hereinabove described.

7

In connection herewith the attention of the Court is respectfully invited to the Addendum to Memorandum in Support of Motion of Petitioners for a Preliminary Injunction.

Respectfully submitted.

John S. Bottomly

Stephen Leonard

Attorneys for Petitioners

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., et al)
vs.) CA No. 1758-73
SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, et al)

ADDENDUM TO MEMORANDUM IN SUPPORT OF MOTION OF PETITIONERS FOR A PRELIMINARY INJUNCTION

This Addendum is respectfully submitted for consideration with the Memorandum submitted with and in support of Motion of Petitioners for a Preliminary Injunction and in anticipation of a Motion to Dismiss which Respondents informed Counsel for Petitioners they would file on September 21, 1973.

THIS COURT HAS JURISDICTION OF THIS ACTION

A distinct basis of jurisdiction is that provided by 28 U.S.C. § 1331(a) over Federal questions where the amount in controversy exceeds \$10,000. The chief aim of the jurisdictional amount limitation in § 1331 is to avoid consuming the resources of the Federal courts in resolving petty controversies, Healy v. Ratta, 292 US 263 (1934), S. Reg. No. 1830 85 Cong. 2d Sess. (1958). The courts have usually looked "to the object sought to be accomplished by the Plaintiffs' complaint," Ronzio v. Denver & R.G.W. R.R. 116 F2d 604, 606 (CA10 1940) in determining the matter in controversy. See also Hatridge v. Aetna Casualty & Surety Co., 415 F2d 809, 814-816 (CA8 1969); Hedberg v. State Farm Mutual Automobile Ins. Co. 350 F2d 924 (CA8 1965). Where constitutional rights are basically at issue in a § 1331 suit, the Supreme Court has construed the jurisdictional amount requirement liberally. In Flast v. Cohen, 392 US 83 (1968), for example, it entertained without discussion of the juris-

dictional basis the appeal of a Federal taxpayer seeking to enjoin the operation of portions of the Elementary and Secondary Education Act of 1965 as violating the Free Exercise and Establishment Clauses of the First Amendment. The Court noted that "the challenged program involves a substantial expenditure of Federal tax funds" 392 US at 103, while nowhere mentioning any alleged monetary value of the Plaintiff's claim. See also Common Cause v. Democratic National Committee, 333 F Supp 803, 807 (DDC 1971).

A second and independent basis of Federal jurisdiction lies under 28 U.S.C. § 1343 (4) which provides jurisdiction "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights...." This action is clearly maintainable under § 1343 (4) in view of the manner in which the public hearings of Respondents have been conducted to date, and the provisions of 2 USC Sec. 190a-1(b) and its legislative history and purpose and its relationship to House Rule XI Clause 33 as more fully set forth elsewhere in this memorandum. (See also 3 U.S. Cong. & Adm. News 1970, Vol. 2, p. 4417 et seq.)

THIS SUIT IS AN APPROPRIATE CLASS ACTION

Defendants claim that this suit may not be maintained as a class action because Plaintiffs do not represent all members of the Fairness Committee or all members of the public who would be affected by the result.

It is well established, however, that an organization whose members are injured may represent those members in a proceeding for judicial review. Sierra Club v. Morton, 405

U.S. 727, 739 (1972); NAACP v. Button, 371 U.S. 415, 428 (1963); NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 458-460 (1958); Bates v. City of Little Rock, 361 U.S. 516, 523 n9 (1960). Recently, Common Cause, a non-profit District of Columbia corporation, conducted an action against the Democratic and Republican National Committees to obtain injunctive and declaratory relief against illegal political contributions and expenditures. The suit was designated a class action, pursuant to Fed R. Civ. Proc. 23(a), (b)(1), and (b)(2), as to "all members of Common Cause who are also registered voters or who make lawful contributions from time to time to candidates or to political committees and political organizations for purposes of supporting [candidates] for Federal elective office, or who otherwise participate in campaigns of candidates for elective federal office." Common Cause v. Democratic National Committee, 333 F Supp. 803, 815 (D.D.C. 1971). In the instant suit, Respondents have pointed to no issues on which the organizational interests of the Fairness Committee differ from those of its individual members.

The Fairness Committee may properly represent all the citizens of the United States in a class action such as this. Although the class is large, it is clear that the prerequisites of Rule 23(a) are met, since (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law on fact common to the class; (3) the claims of the Fairness Committee are typical of the claims of other members of the class; (4) the Fairness Committee will fairly and adequately protect the interests of the class. In addition, the requirements of both Rule 22 (b)(2) and Rule 22 (b)(3) are met since the Respondents have refused to act on grounds applicable to the

class as a whole and since the questions of law and fact common to members of the class predominate over any questions affecting only individual members.

The fact that a class is numerous does not mitigate against allowance of the suit as a class action, Carpenter v. Hall, 311 F Supp. 1099 (ED Tax 1970); Katz v. Carte Blanche Corp., 52 F.R.D. 510 (E.D. Pa 1971), and the actions of Respondents have deprived all citizens of the United States of the protection of the Constitution and the due process of law guaranteed thereby.

Common Cause has already been determined to be an appropriate representative of, inter alia, "all registered voters in the several states and the District of Columbia" in a suit which sought to afford greater access to candidates' finances for the voting public. Common Cause v. Jennings, D.D.C. (Civ. Action No. 848-72 June 20, 1972). Petitioner Fairness Committee has status analogous to Common Cause in its cases cited herein as an appropriate representative of a class, in this case, all citizens of the United States, seeking to protect civil rights of the same importance as the right to vote.

STATUTES AND RULES OF CONGRESS RELATIVE
TO CONDUCTING AND BROADCASTING HEARINGS

Title 2 U.S. Code Sec. 190a-1(b) provides:

"Each hearing conducted by each standing, select or special committee of the Senate (except the Committee on Appropriations) shall be open to the public except when the committee determines that the testimony to be taken at that hearing may relate to a matter of national security, may tend to reflect adversely on the character or reputation of the witness or any other individual, or may divulge matters deemed confidential under other provisions of law or Government regulation. Whenever any such hearing is open to the public, that hearing may be broadcast by radio or television, or both, under such rules as the committee may adopt." (Emphasis supplied)

In its present form 2 USC Sec. 190a-1(b) was enacted as Section 112(a) of P.L. 91-510, Legislative Reorganization Act of 1970, passed by the House of Representatives October 8, 1970 and the Senate October 6, 1970, effective January, 1971. The House Bill -- H.R. 17654 -- was passed in lieu of the Senate Bill (hereinafter at times referred as the bill). The House Report (No. 91-1215) is set out in 3 U.S. Cong. & Adm. News 1970, Volume 2, page 4417.

Section 112 of the bill relates to open hearings of Senate and House standing, select, and special committees. Id., pp. 4482, 4483. Section 112(b) of the bill provides that each hearing conducted by each House standing, select, and special committee shall be open to the public except when the committee, by majority vote, determines otherwise. Id., p. 4483.

Section 116 of the bill pertains to the broadcasting on radio and television of the hearings of Senate and House standing, select, and special committees. Id., p. 4487. Section 116(b) of the bill adds a new clause 33 to House Rule XI providing for the coverage of House committee hearings by radio and television broadcast and still photography. Id., p. 4487. Quoted herewith is a portion of House Report No. 91-1215, said new clause 33 through paragraph f(2) thereof:

"House of Representatives

With respect to the House, section 116(b) adds a new clause 33 to House Rule XI providing for the coverage of House committee hearings by radio and television broadcast and still photography.

Paragraphs (a), (b), and (c) of the proposed new clause 33 state the purpose and intent of the new clause.

Paragraph (a) states the purpose of providing education, perspective, and enlightenment to the public generally with respect to the House of

Representatives as a legislative and representative body, the public issues confronting the House, its consideration and resolution of those issues, and fronting the House, its consideration and resolution of those issues, and the role of the House under the Constitution of the United States as a part of the Federal Government. Paragraph (a) also emphasizes the observance of acceptable standards of dignity and decorum in connection with the coverage of House committee hearings by radio, television, and still photography.

Paragraph (b) states the intent that radio and television tapes and television film of the coverage of committee hearings shall not be used or made available for use as partisan political campaign material to promote the candidacy of any person for elective public office.

Paragraph (c) states the intent that the coverage of each hearing by radio, television, and still photography, and the personal behavior and conduct of all parties at that hearing, conform to traditional standards of dignity, propriety, courtesy, and decorum and not be such as to distort the objectives of the hearing and the activities of House Members or to discredit the House or any Member.

Paragraph (d) emphasizes that the permitted coverage of House committee hearings is a privilege made available by the proposed clause 33 of House Rule XI which may be exercised only in accordance with the stated purpose, intent and requirements of that clause.

Paragraph (e) incorporates into the House Rules provisions constituting the actual grant of authority to each standing, select, or special committee of the House to permit the coverage, by radio, television, and still photography (or by any of such methods of coverage), of any hearing conducted by that committee whenever the hearing is open to the public. This coverage of any open hearing may be permitted only by majority vote of the committee and may apply, as the Committee determines appropriate, to all or part of the hearing. However, the coverage may be effected only if the committee has adopted written rules providing for radio, television, and still photography coverage of its open hearings and these written rules must be in full accord with all of the purposes, provisions, and requirements of the proposed clause 33 of House Rule XI. When the coverage of an open hearing is actually permitted by majority vote of the committee, that coverage must be conducted in accordance with the purposes, provisions, and requirements of the proposed clause 33 and in accordance with the committee rules.

Moreover, paragraph (f) requires that these written rules adopted by a House committee must contain provisions governing the actual conduct of the coverage activities which are to the same effect as the provisions set forth in subparagraphs (1) to (13), inclusive, of paragraph (f). These provisions of subparagraph (f) are of sufficient importance to set forth in this report, as follows:

(1) If the television or radio coverage of the hearing is to be presented to the public as live coverage, that coverage shall be conducted and presented without commercial sponsorship.

(2) No witness served with a subpoena by the committee shall be required against his will to be photographed at any hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted. At the request of any such witness who does not wish to be subjected to radio, television, or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off.
 This subparagraph is supplementary to paragraphs (f)(2)(A) and (m) of clause 27 of this Rule, relating to the protection of the rights of witnesses." (Emphasis supplied)

The legislative purposes to be served by investigations and hearings conducted by the House are the same as those of the Senate. House Report No. 91-1215 makes clear that both the Senate and House each wish to provide as much information as possible to the citizens of the United States consistent with discharge of their legislative duties. There is no evidence that the House performs those duties less effectively than the Senate although it requires its committees to conform with its Rule XI, Clause 33, paragraph f(2), quoted hereinabove.

House Report 91-1215 constitutes substantial evidence that at least one Branch of Congress requires its committees to protect the rights granted to citizens of the United States by the U.S. Constitution. The record to date of the public hearings of the Senate Select Committee on Presidential Campaign

Activities (Select Committee) provides overwhelming evidence that it has either ignored the provisions of 2 USC Sec. 190a-1 (b) or has not made reasonable decisions in good faith in accordance therewith.

The continuing and successful operation of House Rule XI, Clause 33 demonstrates both that a legislative body with responsibilities equal to the Senate recognizes the necessity for the expeditious relief of the type sought by the Petitioners and that without it irreparable harm will be suffered by witnesses and other persons if public hearings of the Select Committee are allowed to resume. The successful operation of the same Clause 33 of House Rule XI is compelling evidence that the relief requested will not unduly burden the Respondents.

Respectfully submitted,

John S. Bottomly
John S. Bottomly

Stephen Leonard
Stephen Leonard

CERTIFICATE OF SERVICE

I Hereby Certify that the foregoing Addendum to Memorandum in Support of Motion of Petitioners for a Preliminary Injunction was served upon _____ counsel for all Respondents herein, this 21st day of September, 1973, by hand-delivering a copy thereof in Court Room 7, Second Floor, United States Court House, Washington, D. C.

Stephen Leonard

Attorney for Petitioners

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED SEP 21 1973

NATIONAL CITIZENS' COMMITTEE FOR
FAIRNESS TO THE PRESIDENCY, INC., et al

JAMES F. DAVEY
CLERK

Plaintiffs)
v.)
SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, et al)
Defendants)

Civil Action
No. 1758-73

MOTION TO DISMISS

Defendants, by their attorneys, hereby move the Court pursuant to Rule 12(b)(6), F. R. Civ. P., to dismiss this action against them on the grounds that the complaint fails to state a claim upon which relief can be granted. Support for this motion is found in the accompanying Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction And In Support of Defendants' Motion to Dismiss.

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR)
FAIRNESS TO THE PRESIDENCY, INC., et al)
Plaintiffs)
v.) Civil Action
SENATE SELECT COMMITTEE ON PRESIDENTIAL) No. 1758-73
CAMPAIGN ACTIVITIES, et al)
Defendants)

ORDER

These matters having come before the Court on plaintiffs' Motion for Preliminary Injunction and defendants' Motion to Dismiss and the Court being of the opinion that plaintiffs' motion should be denied and defendants' granted, it is hereby this _____ day of September, 1973,

ORDERED, that plaintiffs' Motion for Preliminary Injunction be and is denied, and it is further

ORDERED, that defendants' Motion to Dismiss be and is granted.

June L. Green
United States
District Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., et al)
Plaintiffs)
v.) Civil Action
SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, et al) No. 1758-73
Defendants)

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIONS AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Introduction

Plaintiffs have sued to stop the Select Committee's public hearings and moved for preliminary injunctive relief. Defendants oppose this motion and, by their own motion filed herewith, ask the Court to dismiss this action.

This suit and motion for preliminary injunction are spurious. They constitute nothing more than a willful effort to obstruct and delay the conduct of a congressional investigation on matters of pressing public concern.

Plaintiffs contend that the public hearings have been and will be conducted in a fashion that contravenes the Constitution and injures them and the Gargantuan class -- all the citizens of the United States -- they profess to represent. The illegal actions they claim are several. It is, they contend, unlawful for the Committee to investigate and reveal criminal activities. It is further illegal, they say, for the Committee to receive hearsay evidence, to refuse to allow cross-examination by those implicated in testimony and to present publicly testimony that has been previously received in private session. These claims have no merit. As demonstrated below, defendants' conduct in these respects, even accepting the factual allegations of the complaint as accurate, has been totally lawful and proper. The complaint should thus be dismissed.

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The complaint is also dismissable for other reasons.

First, the Speech and Debate clause of the Constitution protects the defendant Senators and the Committee from suits calculated to restrain the exercise of their official legislative duties. Second, plaintiffs have not and cannot demonstrate that they have standing to bring this action.

Because Plaintiffs do not state a proper cause of action, it is obvious that the motion for preliminary injunction must be denied. Furthermore, plaintiffs cannot demonstrate that failure to grant preliminary relief will work them irreparable harm or that the public interest demands that the injunction issue -- both strictures plaintiffs must meet before the relief they request is allowable.

We now proceed to explain in more detail why the motion to dismiss must be granted and the motion for preliminary injunction denied.

I. The Speech and Debate Clause Forecloses this Suit Against the Select Committee and its Members; Moreover, Defendants' Conduct Respecting the Public Hearings Has Been in all Respects Proper and Lawful

Only the Select Committee and its members (all United States Senators) are named as defendants in the present lawsuit. They are sued solely because of official acts performed in the exercise of their legislative responsibilities. The Speech and Debate clause of the Constitution (Art. I, Sec. 6, Cl. 1) -- a privilege limited to the Legislative Branch of Government -- protects such official activity. Gravel v. United States, 408 U.S. 606, 619-20 (1972); Tenney v. Brandhove, 341 U.S. 367 (1951); Hearst v. Black, 66 U.S. App. D.C. 313, 316-17, 87 F. 2d 68, 71-72 (1936).

Directly controlling here is the Supreme Court's recent decision in Gravel. While narrowing the scope of Speech or Debate immunity in other respects, the Court made clear that committee hearings are a central part of a Senator's official duties, and that a Senator is therefore immune from suit for his conduct of such hearings:

"... A Member's conduct at legislative committee hearings... may not be made the basis for a civil or criminal judgment against a member because that conduct is within the 'sphere of legitimate legislative activity'." 408 U.S. at 624.

And last term in Doe v. McMillan, 93 S. Ct. 2018, 2025 (1973), the Supreme Court reasserted that:

"Congressmen and their aides are immune from liability for their actions within the legislative sphere even though their conduct, if performed in other than legislative context, would in itself be unconstitutional...."

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Accordingly, this suit must be dismissed.^{*/}

Moreover, none of the acts challenged by plaintiffs' are, in fact, unconstitutional or illegal, as now demonstrated.

^{*/} In United States Servicemen's Fund v. Eastland _____ U.S. App. D.C. _____, _____, F.2d _____ (No. 24, 279, 24, 412, 71-2034, Aug. 30, 1973), the Court of Appeals refused, at the outset of litigation, to dismiss congressmen defendants from a lawsuit challenging the issuance of a congressional subpoena. That however, was a suit brought by the target of the subpoena, and the Court concluded that the subpoena served no legislative purpose and was an unconstitutional invasion of the target organization's own First Amendment rights. In these circumstances, the Court concluded that there was a sufficiently substantial question whether the subpoena involved "legislative" acts to make it inappropriate to dismiss the congressmen as parties. That ruling has no bearing here where the Committee's activities are plainly "legislative," the activities are not challenged by the targets of the investigation, and the challenge is plainly insubstantial.

A. The Select Committee is Fully Authorized to Investigate and Publicize Corruption in the Executive Branch.

Plaintiffs assert that investigation of criminal conduct by the Select Committee is illegal. (see, e.g., para. 24 of compl.) It is, however, well settled that a congressional committee may investigate and publicize criminal activity by the executive branch and others; indeed, this function is among the most important responsibilities of the legislature.

As the Supreme Court recognized in McGrain v. Daugherty, 273 US 135 (1927), congressional committees, since the beginning of the nation, have investigated wrongdoing and maladministration by executive officials under the constitutional power of Congress to determine the need for new legislation and fulfill an associated informing function. In McGrain a Senate investigation into Justice Department laxity in the Teapot Dome scandal was resisted on the grounds that it was "an attempt to prosecute, try, and determine the guilt or innocence of Harry M. Daugherty, the Attorney General.. Congress has no such power except in impeachment proceedings." ^{*/} (Argument for Appellee, 71 L Ed. 58) ^{**/} This assertion -- substantially similar to the arguments of plaintiffs in the present case -- was flatly rejected by the Supreme Court, which upheld the validity of the investigation and ruled that:

- (I) "The power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function" 273 U.S. at 174.

^{*/} Plaintiffs also claim that the Select Committee is violating the impeachment provision of the Constitution. Complaint, para. 33 (a).

^{**/} The Respondent in the case was Mally S. Daugherty, brother of Attorney General Harry M. Daugherty.

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(2) The Attorney General's administration of the Justice Department was "[p]lainly [a subject] on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." 273 U.S. at 177.

(3) It was not "a valid objection to the investigation that it might possibly disclose crime or wrongdoing" by the Attorney General. 273 U.S. at 180.

See also e.g., Sinclair v. United States, 279 U.S. 263 (1929) (Supreme Court rejected claim that Senate investigation of Teapot Dome scandal was invalid because it dealt with allegedly unlawful conduct within the exclusive province of the judiciary);*/ Hutcheson v. United States, 369 U.S. 599 (1962) (Senate Select Committee on Improper Activities in the Labor Management Field could properly investigate unlawful use of union funds to influence prosecution); Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F. 2d 894 (1972) (Senate Government Operations Permanent Subcommittee on Investigations; investigation of riots and violent disorders valid).

Indeed, the very existence of the "use immunity" statute for compelled testimony before Congress, which this Court construed in In Re: Application of United States Senate Select Committee on Presidential Campaign Activities (D.D.C., Misc. No. 70-73, June 12, 1973), recognizes that congressional investigations may deal with conduct which may also be the subject of criminal prosecution.

Congressional investigation of criminal conduct has an especially strong foundation where executive wrongdoing is in issue. As pointed out in Delaney v. United States, 199 F. 2d 107, 115, (1st Cir. 1952), the leading case involving pretrial publicity provoked by a congressional hearing:

"In such a situation [i.e., a legislative hearing relating to a public official not then under indictment] the investigative function of Congress has its greatest utility: Congress is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity."

*/ Sinclair repudiated the argument, advanced by plaintiffs here (Complaint para. 33 (c)), that a legislative investigation of unlawful conduct constitutes an unconstitutional usurpation of Article III judicial power.

The Select Committee would be unpardonably remiss if, in this time of public doubt in the integrity of our governmental system, it did not push forward to full revelation of the facts. It would be equally remiss if it closed its hearings to the public which has a right to be accurately informed of the corruption that infected the 1972 Presidential campaign and election.

Beck v. United States, 298 F. 2d 622, 628 (9th Cir. 1962). See also

Silverthorne v. United States, 400 F. 2d 627, 633-34 (9th Cir. 1968):

"The Senate Committee and the federal grand jury are associates in exposing criminal activity and moving towards its curtailment."

If the position of plaintiffs were accepted, the testimony of critically important witnesses would be excluded from public view. It was, however, the judgment of a unanimous Senate^{*/} in Senate Resolution 60, 93d Congress, 1st Session (1973) that there is a pressing need to explore remedial legislation and to expose for public scrutiny all the facts relating to the Watergate scandal. There can be no doubt that the informing process is a necessary concomitant to the enactment of legislation, for it is widely recognized that proposed legislation lacking popular support rarely survives.

The "informing function" of Congress, while important to its legislative mission, also serves other important values. Our democratic system is premised on the principle . . . that there is a need to inform the public simply because of the right of the public to know the truth about misconduct by executive officials -- even though some people may find the truth distasteful. As the Supreme Court stated in Watkins v. United States, 354 U.S. 178, 200 (1957):

"There is a power of the Congress to inquire into and publicize corruption, maladministration or efficiency in agencies of the Government. That is the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id., at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature."

^{*/} Plaintiffs claim they have no adequate legislative remedy, Compl. para. 36. But the Senate can stop the Select Committee at any time by cutting off (continued on following page)

In United States v. Rumely, 345 U.S. 41 (1953), the Supreme Court termed the congressional informing function "indispensable" and also quoted Woodrow Wilson with approval:

"'It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.' Wilson, Congressional Government, 303." Id. at 43.

This lawsuit -- a rash and belated ^{*/} attempt to shut off the hearings by self-appointed spokesmen for the nation -- thus has no legal basis insofar as it claims that the Committee is barred from investigating and exposing criminal conduct.

B. The Select Committee May Properly Conduct Hearings Without Granting a Right of Cross Examination to each Witness and Without Adopting Jury-Trial Rules on the Admissibility of Hearsay Evidence.

At the hearings before the Select Committee -- as in any legislative hearing -- there are no defendants, no plaintiffs, and no civil or criminal penalties. In such circumstances it has long been recognized that the rules of evidence -- particularly the technical rules on the admissibility of hearsay evidence -- are inapplicable. Yet plaintiffs

^{*/} (continued from preceding page) its funding or rescinding its Resolution. That it has not done so signifies its approval.

^{*/} The Plaintiffs appear to suggest that not until September 12, 1973 did they realize that the Select Committee would conduct further hearings. Complaint, para. 22. Yet it was well publicized last August that the hearings would only go into recess for the latter part of that month. Thus, plaintiffs knew, or should have known, at least a month ago that the hearings would continue.

object that there is no general right of cross examination*/ for every witness or for every person mentioned in testimony. Complaint, para. 27. They also object to the admissibility of hearsay evidence. Complaint, para. 25. **/ These objectives are totally groundless.

Even when an individual's liberty is at stake, a grand jury may indict on the basis of hearsay evidence. Costello v. United States, 350 U.S. 359 (1956). And of course there is no cross-examination allowed in a grand jury proceeding. Id. An administrative tribunal may base a decision on hearsay evidence, with its concomitant lack of cross-examination.

Richardson v. Perales, 402 U.S. 389 (1971); Davis Administrative Law Treatise #1405.

If such adjudicatory tribunals may properly restrict cross-examination and hearsay rights, a fortiori an investigative tribunal with no adjudicatory functions -- such as this Select Committee -- should not be and is not bound by the technical rules of evidence. ***/ In Hannah v. Larche,

*/ "However the counsel for a witness/ may submit in writing any questions he wishes propounded to his client or any other witness." Select Committee Rules of Procedure, Rule 24.

**/ These objections are one and the same: the real objection to hearsay is that the witness may not be subjected to cross-examination on the truth of the matters on which testimony is given.

***/ Moreover, much of the hearsay admitted in the Select Committee hearings -- i. e., the hearsay statements of an alleged co-conspirator -- are fully admissible in any court of law under a well-recognized exception to the hearsay rule. United States v. Publiese, 153 F. 2d 497 (2d Cir. 1945); United States v. Annunziato, 293 F. 2d 373 (2d Cir. 1961); Allen v. United States, 4 F. 2d 688 (7th Cir. 1925); Krulewitch v. United States, 336 U.S. 440 (1949).

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363 U.S. 420 (1960), the Supreme Court, relying on the practice of congressional committees, held that the due process clause of the Fifth Amendment does not require an investigatory body to observe the requirements of confrontation and cross-examination applicable to criminal prosecutions. See 363 U.S. at 441-42.

The Court went on to hold that such procedural safeguards are unnecessary even through the investigative proceedings that might lead to criminal prosecutions. Id. at 443. If criminal prosecutions in fact eventuate, the person accused will be entitled to the appropriate procedural safeguards in the prosecution. Id. at 446. In the meantime, the Court observed, it would be seriously disruptive and inefficient to allow various witnesses to turn a purely investigative proceeding into a trial:

The investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceedings would make a shambles of the investigation and stifle the agency in its gathering of facts. Id. at 443-44*/

As recognized by the Court of Appeals for this Circuit in United States v. Fort, 143 U.S. App. D.C. 255, 443 F.2d 670 (1970), the rulings in

*/ In support of its holding, the Court in Hannah noted that legislative investigatory committees have only rarely accorded witnesses procedural rights such as the opportunity to cross-examine other witnesses. The Appendix to the Court's opinion, which tabulates executive agencies and legislative committees and the investigative procedures established by each, demonstrates that the Select Committee has accomplished as much as any of its predecessors in ensuring procedural fairness to those accused of wrongdoing in the course of its hearings. See the Select Committee's Rules of Procedure and Guidelines, attached hereto.

Hannah are fully applicable to legislative investigations. In Fort, the Court flatly rejected the claims of a congressional witness that he should be afforded the rights of confrontation and cross-examination, even though the congressional investigation was directed at wrongdoing in which the witness might be implicated. Following Hannah the Court pointed out that "the congressional investigation with which we are here concerned is an investigative proceeding" and that "Congress is not empowered to adjudicate criminal sanctions on a witness" (143 U.S. App. D.C. at 264), and held that the committee therefore was not required to allow confrontation and cross-examination.

The decision of the Supreme Court in Hannah and the decision of the Court of Appeals for the Circuit in Fort are controlling here. Plaintiff's procedural claims are without merit.

II. Plaintiffs Have No Standing to Bring This Action.

Plaintiffs sue on their own behalf and on behalf of two alleged classes: (1) All persons who are citizens of the United States; (2) All members of plaintiff Fairness Committee who are members of the first class. There is no claim that any named plaintiff expects to be called before the Select Committee to testify. It is not alleged that any member of the plaintiff Committee will be called before the Select Committee. It is clear, in the circumstances of this case, that plaintiffs have no standing to bring this action, as now demonstrated.

We fail to see how the named plaintiffs, who have not been and will not be called to testify before the Committee, can claim any injury. As the Supreme Court said in Sierra Club v. Morton, 405 U.S. 727 (1972), which also involved an organization's claim to represent wide-ranging interests, standing to sue in the federal courts requires that there be an "injury in fact" and that the plaintiffs be "among the injured." 405 U.S. at 735. Assuming, arguendo, that there might be some "injury" caused by the Committee's hearings, neither the individual plaintiffs nor the plaintiff Committee can, by any stretch of the imagination, be considered to be "among the injured."

Plaintiffs cannot achieve standing for themselves by the claim that members of their putative classes have suffered injury. The "stated rule is that / a plaintiff / may not assert the rights of some other person." Wright, Law of Federal Courts 43 (1970). This principle has been specifically applied in the class action context; it has been held that, absent injury to themselves, named plaintiffs are not endowed

with standing simply because certain members of the class they allegedly represent have been injured. Bailey v. Patterson, 369 U.S. 31, 32 (1962); Greenstein v. Paul, 275 F.Supp. 604, 605 (S.D. N.Y. 1967), aff'd, 400 F.2d 580 (2d Cir. 1968); Broomer v. Schultz, 239 F.Supp. 699, 705 (E.D. Pa. 1965), aff'd, 356 F.2d 984 (3d Cir. 1966).
*/

Plaintiffs claim this is a taxpayers suit and seek solace in Flast v. Cohen 392 U.S. 81 (1968), but that opinion provides no support for their claim of standing. To show standing under Flast, a plaintiff must establish, first, "a logical link between [the taxpayer] status and the type of legislative enactment attacked." 392 U.S. at 105, and, second, "a nexus between that status and the precise nature of the constitutional infringement alleged." Id. at 102-03. As to the first, it is "not... sufficient to allege an incidental expenditure of tax funds." Id. at 105. As to the second, "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Article I, § 8." Id. at 102-03.

Plaintiffs fail to meet either standard set forth in the Flast case. They do not attack the constitutionality of the appropriation for the Committee, but seek only to prohibit use of these funds to support public hearings conducted under the procedures now employed. Such an "incidental expenditure of tax funds" is insufficient to establish the

* A corollary principle is that, in order to bring a class action, at least one named plaintiff must actually be a member of this class. "The purpose of this threshold requirement is to ferret out officious intermeddlers who do not possess the substantive right to litigate the claim sought to be litigated on behalf of others." Rockler & Co. v. Graphic Enterprises, Inc. 52 F.R.D. 335, 338 n. 4 (D. Minn. 1971). See also MacDonald v. Shawnee Country Club, Inc., 438 F.2d 632 (6th Cir. 1971); Carroll v. Associated Musicians of Greater New York, 316 F.2d 574 (2d Cir. 1963).

requisite link between the appropriation and the plaintiffs' status as taxpayers. And, without any specific challenge to the constitutionality of the appropriation, it can hardly be claimed that the second Flast test is met. This case is thus clearly distinguishable from Flast, where the asserted effect of the challenged expenditure itself was to violate the Establishment Clause. See Doremus v. Board of Education, 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923).

There is thus no basis upon which plaintiffs can establish standing in the present circumstance. Moreover, to permit plaintiffs to sue in a case such as this would pave the way for numerous unwarranted suits in the future by persons unhappy with the discretionary expenditure of appropriated funds, whose interest in such expenditures is quite remote. Such a ruling would invite litigious harassment of Congress and other branches of government. The complaint must be dismissed for want of standing.

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III. Plaintiff's Motion for Preliminary Injunction Must be Denied

It is settled law that a motion for preliminary injunction must be rejected if plaintiffs have little chance of ultimate success. Embassy Dairy v. Camalier, 93 U.S. App. D.C. 364, 367, 211 F.2d 41, 43 (1954), Perry v. Perry, 88 U.S. App. D.C. 337, 190 F.2d 601 (1951); Green v. Kennedy, 309 F. Supp. 1127, 1133 (D.D.C. 1970) appeal dismissed 392 U.S. 956 (1971). As we have demonstrated in the preceding three sections of this brief, plaintiffs have no chance of success in this suit. Their motion must therefore be denied. But even if they had some favorable prospect, preliminary relief would be inappropriate for several reasons.

A motion for preliminary injunction is unsupportable unless plaintiffs can show that failure to grant it will work them irreparable harm. Younger v. Harris, 401 U.S. 37, 47 (1970); Beal v. Missouri Pac. Ry., 312 U.S. 45, 49 (1941); Cline v. Frink Dairy Co., 274 U.S. 445, 452 (1927). There is no such showing here. Plaintiffs assert in their papers (Complaint, para. 31) that the Committee has "disrupted the domestic tranquility of the United States ... to the damage of all its citizens", but this is merely ipse dixit. To say it does not make it so. We can assert, with much more plausibility we think, that the hearings have been beneficial and therapeutic to the citizenry, that they have exposed shameful corruption to public view, that they have restored vigor to our system of criminal justice and that they have reinstilled a recognition of the importance of integrity of government. We recognize that our assertions, like plaintiffs', are not proper proof, but the point to be stressed is that the burden is on plaintiffs to make a factual showing of irreparable harm. In this task they have failed.

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Similarly, plaintiffs have not shown that the public interest demands a preliminary injunction, a regimen they must meet before such process may issue, Yakus v. United States, 321 U.S. 414, 440 (1944); Va. Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937); Va. Petroleum Jobber Assn. v. F.P.C., 104 U.S. App. D.C. 106, 112, 259 F. 2d 921, 927 (1958). The Court cannot reach this conclusion on the basis of their unsupported claims. We submit, moreover, that these claims are counterfactual. Senate Resolution 60 establishing the Committee, which was passed by a unanimous vote of the Senate, represents a legislative judgment that the conduct of the Committee's business in full public view is in the public interest. We also suggest that, in a democracy, it is hardly in the public interest to impose some form of prior censorship on the dissemination of information respecting corruption in government. In any event, without an affirmative demonstration by plaintiffs that the public interest weighs against the hearings in their present format, their motion must be rejected.

*See 2 U.S.C. 190 a-1 (b) and the Select Committee's Guidelines, which allow televised hearings.

**We would also reference the tens of thousands of letters, telegrams, telephone calls, etc., that the Select Committee has received from the public urging continuance of the hearings in current form. Communications supporting our efforts far outweigh those that are negative.

***It would also be inappropriate to issue a preliminary injunction before the question whether there is a proper class has been determined. Dorfman v. Boozer 134 U.S. App. D.C. 272, 414 F.2d 1168 (1968). We fail to see how a nationwide class can be sustained because, e.g., there are obvious conflicts of interests and antagonisms in that group; certain Americans may feel the hearings should be non-public, but many others strongly approve public hearings. See, e.g., Hansberry v. Lee, 311 U.S. 32 (1940), Shulman v. Ritzenburg 47 F. Supp. 202, 207 (D.D.C. 1969)

Finally, we observe that plaintiffs have made no offer to satisfy the security provisions of Rule 65 (c), F.R. Civ. P. We suggest that plaintiffs' motion for preliminary injunction, which if granted would seriously handicap the Committee's work and debilitate its effectiveness should not even be considered unless they represent that they are prepared to post bond in considerable amount.

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Conclusion

We have demonstrated that the Speech and Debate clause prevents this action against the Committee and its members and that, in any event, the Committee's conduct of its hearings is entirely lawful. We have also demonstrated that plaintiffs have no standing to bring this action. Finally, we have shown that plaintiffs have no chance of success in this suit and assert no facts to prove that they will suffer irreparable harm if a preliminary injunction is not granted or that the public interest demands such relief. The conclusion must be that the motion for preliminary injunction should be denied and the suit dismissed. Plaintiffs should not be permitted to tamper with the inner-workings of a lawful congressional committee. Neither the defendants nor the Court should be forced to trifle further with a lawsuit that is utterly without merit.

Respectfully submitted,

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Minority Counsel

Rufus Edmisten
Deputy Counsel

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., et al }
Petitioners }
v. }
SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, et al }
Respondents }
 }
Civil Action
No. 1758 - 73

MEMORANDUM IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS

INTRODUCTION

In their Memorandum in Support of Motion to Dismiss, Respondents state that this suit is "spurious" and "constitutes nothing more than a willful effort to obstruct and delay the conduct of a Congressional investigation on matters of pressing public concern". Petitioners cannot allow such statements, no matter how unwarranted or self-serving, to stand unanswered on the record.

In the first place, as the Court has no doubt noted, Petitioners do not seek "to obstruct and delay" the investigation of the Respondents. For reasons stated in the Petition, the Motion for Preliminary Injunction, and the Memorandum and Addendum thereto in Support of that Motion, the Petitioners pray that this Court will enjoin any further public hearings of the Senate Select Committee on Presidential Campaign Activities (Select Committee).

Closed hearings under the protection of procedures in *Costello v. United States*, 350 U. S. 359 (1956), cited by Respondents on page 9 of their Memorandum, are precisely the relief which Petitioners seek to protect the rights of all citizens of the United States.

Until the Select Committee conducted its public hearings and announced its intention to renew such hearings, neither Petitioners nor any other person could expect or comprehend that Respondents would ignore 2 USC 190 a-1(b) and the House of Representatives.

I. THE SPEECH AND DEBATE CLAUSE DOES NOT FORECLOSE THIS ACTION AGAINST RESPONDENTS

The Speech and Debate clause of the U. S. Constitution (Article I, Section 6, Clause 1) was intended to and does immunize Congressmen and their aides from "liability" (emphasis supplied) for their actions within the legislative sphere... " Doe v. McMillan, 93 S. Ct. 2018, 2025 (1973). That, however, does not provide grounds for dismissal of this action. The history and the deliberations resulting in the inclusion of that protection of a Member of Congress make it clear that it is intended to and does prevent any citizen or group of citizens from attempting to recover damages from the purses of individual Congressmen for any acts by them in the discharge of their legislative duties.

II. PETITIONERS DO NOT ASSERT SELECT COMMITTEE IS NOT AUTHORIZED TO INVESTIGATE CORRUPTION IN ANY BRANCH OF THE GOVERNMENT

Respondents cite *McGrain v. Daugherty* 273 U. S. 135 (1927) as dispositive of the prayers of Petitioners because it included arguments "substantially similar to the arguments of" Petitioners. There is a similarity in some of the arguments, but the facts relating to *McGrain v. Daugherty* and the instant case are substantially different. 28 USC Par. 1331 and 1343 (4)

did not exist in 1927. Rule 23 (b) (3) did not exist in 1927. Radio broadcasting was a relative infant in 1927. Television broadcasting did not exist. The technical and legal developments since 1927 vastly increased the potential of any public hearing of Congress to establish precedents impairing and irreparably damaging the Constitutional rights of citizens of the United States. Concomitant with those technical developments, but necessarily lagging behind has been the establishment of statutory and case law and rules of procedure to continue the protection of the constitutional rights of citizens of the United States. Broad judicial acceptance of the wisdom and necessity of the expansion of who could ask the Courts to protect those rights is evident in the cases cited in Memorandum of Petitioners in Support of Preliminary Injunction and Addendum thereto. That this particular Court is a leader in recognition and nurturing that growth has been most recently demonstrated by the Common Cause cases cited in the said Memorandum of Petitioners. This case constitutes a logical extention of those continuing developments to protect citizens of the United States from the tyranny of technological advances.

Respondents argue on page 7 of their Memorandum in Support of Motion to Dismiss that "the public has a right to be accurately informed...". There is no support for the accompanying contention of Respondents that the right of the public to information overrides the constitutional protections of citizens of the United States. The development of those Congressional procedures discussed in the Addendum to the Memorandum of Petitioners in support of Motion for Preliminary Injunction is contra to the contentions of Respondents in this regard. The "informing function" of Congress must

be and in the case of the House has been circumscribed with protections of the individual. A witness before a Congressional committee is entitled to the protection of due process of law. *Yellen v. U. S.* 374 U. S. 109, *Watkins v. U. S.*, 354 U. S. 178, *Sinclair v. U. S.* 279 U. S. 263. The procedures necessary to assure that protection must adapt and have adapted to changing technology. The constitution and its implementation are not static

The power of inquiry must be exercised with due regard to the rights of witnesses. *U. S. v. DeCarlo*, 102 F. Supp. 597, 602; *U. S. v. Rumely* 345 U. S. 41.

This action is not a rash and belated action. It has been commenced in good faith as soon as possible, as the facts upon which it is based become known. It is consistent with and analogous to actions by similarly chartered, non-profit corporations presently pending in this Court. (Common Cause cases, op. cit). It is well within 28 USC 1343 (4) and Rule 23 (b) (3).

III. PETITION THAT SELECT COMMITTEE GRANT RIGHT OF CROSS EXAMINATION

Respondent Sam J. Ervin, Jr. has stated in effect that the subject matter of the investigation of the Select Committee is more traumatic than the Civil War. Notwithstanding the expression of that opinion Respondents have adopted procedures which ignore the impact of modern, instant communication of events on both participants and observers. The right of cross examination has in the past been granted to some witnesses before a Congressional investigating committee, specifically during the so-called Army-McCarthy hearings of 1954. While the Senate stated ". . . these

procedural rules are not in any way to establish a precedent" that the Senate did not wish cross-examination to extend to all hearings. (See Sen. Res. No. 2507, 83rd Congress, 2nd Sess. (1954). At the same time it is clear that during a governmental crisis of major significance the Senate did provide the right of cross-examination. Among the many factors which persuaded the Senate so to act must be included the impact of broadcasting those hearings on national television.

Analogous authority may be taken from the procedures followed by the committees of the House of Representatives. A review of the precedents indicates that committees of Congress have allowed cross-examination of witnesses even by persons who were not members of Congress. United States v. Fort, 143 U. S. App. D. C. 255 (1970) at 265.

Respondents cite the fact that a grand jury may indict on the basis of hearsay evidence in support of their allowing such testimony. They rely on Costello v. United States, 350 U. S. 359 (1956). The thrust of that case provides more support to the Petitioners because it must be noted that grand jury proceedings are conducted in secret. The Petitioners are not seeking the total secrecy of a grand jury, but more the protection of individuals afforded the Courts by their rules governing press and broadcasting coverage during trials.

For purpose of their Memorandum in Support of Respondents Motion to Dismiss they have joined for considerations the prayers of Petitioners relating to cross-examination and hearsay. Admissions of hearsay evidence

without cross-examination by administrative tribunals and the Civil Rights Commission (Hannah v. Larche; 363 U. S. 420 (1960)) are cited by Respondents to justify their similar rules. Again, as in their reliance of the inaccurate analogizing of the Select Committee with a grand jury, the Respondents ask this Court to ignore the fact that the proceedings of the Select Committee are in public and on national television while the proceedings giving rise to Richardson v. Perales, 402 U. S. 389 (1971) and Hannah v. Larche, op. cit. were public only in the most superficial sense of that word and certainly were not broadcast on national television.

The footnote on page 10 of Memorandum of Respondents in Support of Motion to Dismiss displays again the consistency with which Respondents omit relevant information. The inference of that footnote is that the Select Committee is as procedurally fair as any Congressional committee, an allegation which is demolished by a comparison of House Rule XI, Clause 33 with those procedures. (See Addendum to Memorandum in Support of Motion of Petitioners for a Preliminary Injunction, pp. 4-8). Once again in relying on United States v. Fort, 143 U. S. App. D. C. 255 Respondents fail to inform this Court that the hearings which gave rise to that case were not broadcast on national television.

Selectivity is expected in the choice of cases to be cited to support contentions in memoranda, briefs and arguments. However, the consistent failure of Respondents to refer to the procedures of the only near analogy - the Army-McCarthy hearings of 1954 - and to the protection of individuals provided by provisions of Clause 33 of House Rules XI must be construed

as an effort to divest the attention of the Court from a stated and major objective of this action - to prevent infringement of the Constitutional rights of U. S. citizens by abuse of the power of modern technology.

In the same spirit, the Respondents argue on page 7 of their Memorandum in Support of Motion to Dismiss that they would be unpardonably remiss if they did not push forward to revelation of the facts by "accurately" informing the public of governmental corruption. That is a proper duty for any instrument of government, but it must be discharged under circumstances which protect the rights of each and every individual citizen. The admitted hearsay character of much of the evidence developed by the Respondents cannot fail to cast doubt on their stated presumption that they are "accurately" informing the public. No legislative purpose would be frustrated by the cessation of public hearings of the Select Committee (See House Rule XI, Clause 33). Even without the Respondents honoring the subpoena duces tecum duly served on them, it is evident from the conduct of Respondents during public hearings and elsewhere that they are not causing public scrutiny of all (emphasis supplied) the facts relating to the Watergate scandal.

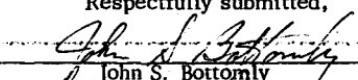
IV. PETITIONERS HAVE STANDING TO BRING THIS ACTION.

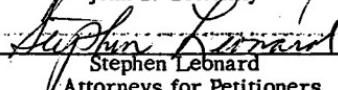
See Memorandum of Petitioners in Support of Motion for Preliminary Injunction, pp 4 through 7 and Addendum thereto, pp 1 through 4.

V. MOTION OF PETITIONERS FOR PRELIMINARY INJUNCTION MUST BE ALLOWED

See Memorandum of Petitioners in Support of Motion for Preliminary Injunction, pp 2, 3 and 4 and Addendum thereto, pp 4 through 8, particularly p. 8.

Respectfully submitted,


John S. Bottomly


Stephen Leonard
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Opposition to Motion of Respondents to Dismiss was served upon all Respondents hereto by hand-delivering a copy thereof to _____ Attorney for such Respondents this 21st day of September, 1973 in Court Room 7, Second Floor, United States Court House, Washington, D. C.

Stephen Leonard
Attorney for Petitioners

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR
FAIRNESS TO THE PRESIDENCY, INC., et al.,

Plaintiffs,

v.
SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, et al.,

CIVIL ACTION

NO. 1758-73

Defendants.

TRANSCRIPT OF PROCEEDINGS

WASHINGTON, D. C.

DATE: September 21, 1973

VOLUME NO.

PAGES: 1 - 27

PREPARED FOR: SENATE SELECT COMMITTEE

ELAINE O. WELLS
OFFICIAL COURT REPORTER
UNITED STATES COURT HOUSE
WASHINGTON, D. C. 20001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR :
FAIRNESS TO THE PRESIDENCY, INC., et al., :
Plaintiffs, :
v. : CIVIL ACTION
SENATE SELECT COMMITTEE ON PRESIDENTIAL :
CAMPAIGN ACTIVITIES, et al., : NO. 1758-73
Defendants. :

Washington, D. C.

Friday, September 21, 1973

The above-entitled cause came on for hearing before
THE HONORABLE JUNE L. GREEN, United States District Judge,
at two p.m.

APPEARANCES:

JOHN S. BOTTOMLY, ESQUIRE
STEPHEN LEONARD, ESQUIRE

For the Plaintiffs
RONALD D. ROTUNDA, ESQUIRE
JAMES HAMILTON, ESQUIRE

For the Defendants

P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action No. 1758-73, National
Citizens' Committee, et al., vs. Senate Select Committee, Mr.
Leonard for the plaintiff, Mr. Hamilton for the defendant.

MR. LEONARD: May it please the Court, I am Stephen
Leonard, counsel for the petitioners in this matter.

I would like to present to the Court John S. Bottomly,
a member of the court of Massachusetts, and I would like to
move his admission for this case.

THE COURT: We are glad to have you.

MR. BOTTOMLY: Thank you, Your Honor.

MR. LEONARD: I would like also, Your Honor, to introduce
to the Court Rabbi Korff, one of the principal petitioners in
this matter, who has come to Washington to participate in the
proceedings.

THE COURT: Very well.

MR. LEONARD: Thank you, Your Honor.

THE COURT: Would the defense care to introduce the
people at their table?

MR. HAMILTON: Your Honor, my name is James Hamilton
and I am Assistant Chief Counsel for the Senate Select Committee
on Presidential Campaign Activities, and I represent all of
the defendants in this case.

With me at the table are Mr. Ronald Rotunda, who is
an Assistant Counsel for the committee, and Joel Kleinman, who

who is a Research Assistant for the committee.

THE COURT: Very well.

First, I would like to ask the petitioners about the standing of your plaintiffs.

MR. BOTTOMLY: Yes, Your Honor.

We have dealt with that subject in our motion in support of the preliminary injunction and we have prepared an addendum to that which is on its way from the typist. It is in response to the motion -- excuse me, Your Honor. It is on its way from the typist.

THE COURT: You are prepared to argue it at this time, are you?

MR. BOTTOMLY: I would like, Your Honor, if I may, to have you with the addendum before you while we argue it, but if you wish I will be glad to go forward.

THE COURT: Do you have an idea as to when we might expect it?

MR. BOTTOMLY: Momentarily, Your Honor. We expected it by this time -- before this time.

Your Honor, we did not get the motion to dismiss from the respondents until 10:45 this morning, and we have been preparing since our responses to that.

I am sure the Court is aware that the respondents had the pleadings as early as Monday, but they did not deliver a copy of their motion to dismiss to us until 10:45 this morning.

THE COURT: I didn't know they were served as early as Monday.

MR. BOTTOMLY: They were, Your Honor.

MR. HAMILTON: If I may say something, though, Your Honor, we did have the pleadings on Monday afternoon but we didn't know that the hearing was going to be this afternoon until Wednesday.

Of course, under local rules, we have ten days to reply to a motion for a preliminary injunction.

MR. BOTTOMLY: In response to that, Your Honor, I would like to point out that just a cursory reading of the pleadings would indicate that our prayers were for an injunction against continuation of the public hearings next Monday.

THE COURT: It wasn't in the nature of a temporary restraining order, however, which is one that would have brought it up more expeditiously.

A preliminary injunction is not generally required to be set so rapidly.

MR. BOTTOMLY: Yes, Your Honor, but I just brought the point up as a factual matter that the respondents, when they read the pleadings, knew that we would be seeking a hearing prior to next Monday.

THE COURT: Can you give us an estimate as to how long you think it might be before we receive the papers?

MR. BOTTOMLY: Well, we were informed at about 1:40

by the secretarial service, that they had been typed. We sent a messenger to get them, and it is a traffic problem at this point, Your Honor.

MR. HAMILTON: Your Honor, if it would expedite these proceedings, I am happy, even though I suppose I should go second, to go first, and make the arguments on standing and on any other points you would like to hear on at this time.

THE COURT: Very well. Suppose you do.

MR. HAMILTON: May it please the Court, my name is James Hamilton and, as I have said, I represent all of the defendants in this matter.

There are two motions before the Court this afternoon: plaintiffs' motion for a preliminary injunction, and our motion for a dismissal.

If I may I would like to deal first with our motion for dismissal.

THE COURT: Very well.

MR. HAMILTON: As I read this complaint, plaintiffs' claims are in essence this:

First, that the Select Committee's actions are unlawful because it is investigating criminal activity and exposing its findings to public view;

Second, the Committee's activities are unlawful because certain jury trial rights, the right to the exclusion of hearsay evidence, and the right to cross-examination by persons implicated in the testimony, are not observed by the Committee.

Moreover, these plaintiffs assert that they may enjoin Senators from the exercise of their legislative duties even though none of the plaintiffs have been called or will be called before the Select Committee to testify.

I would respectfully submit to the Court that rarely has a suit been brought that is so devoid of merit.

First, it is a well settled principle that the Speech and Debate clause of the Constitution protects Congressmen from suits that interfere with their official legislative duties.

The recent Gravel case, which I am sure is well known to the Court, emphasizes that committee proceedings are a part of a legislator's official duties and thus fall under Speech and Debate immunity.

But we need not rely solely on the immunity granted by the Speech and Debate clause, because I believe that it is clear that all of the actions challenged by the plaintiffs in this suit are entirely legal.

I submit that it hardly could be plainer that Congress has the power and the authority to investigate criminal activity in high administrative places.

Perhaps the clearest expression of this principle is found in the Supreme Court's opinion in *McGrain v. Daugherty*, which we cite in our brief.

But I submit that the cases holding that a Congressional Committee may investigate corruption and criminality, these

cases are legion, and Congress has exercised the power from the earliest days of the nation.

It is also completely established that the Congress has the right to expose its findings regarding criminality and corruption to the public view.

The Supreme Court, in the Watkins case and the Rumely case, which we cite in our brief, has emphasized the importance of the Congressional informing function and, indeed, has said that this function is just as important as the function of enacting legislation.

Now, there is no more justification for plaintiffs' claims that jury trial protections, such as exclusion of hearsay evidence, and the confrontation through cross-examination, should be required or are required in Congressional hearings.

This claim not only ignores the history of Congressional investigations, but it also goes squarely against decisions by the Supreme Court and by our Court of Appeals.

We have cited in our papers the Hannah case and the Fort case, which indicate quite clearly, I believe that hearsay and cross-examination rules do not apply to Congressional hearings, and that in fact it would be disruptive and unduly time-consuming to apply these jury trial protections to investigatory proceedings.

Now, Judge Green, we submit that not only are plaintiffs' claims on the merits unfounded, but that they have no standing

to make these claims.

As I have said, no named plaintiff has been called to testify before our Committee, and none will be.

It is thus difficult to see how the plaintiffs have suffered any injury in fact, and I submit that any alleged injury to the public generally, if such does exist, is much too remote to create standing in plaintiffs as part of that public.

The fact that some of the members of the mammoth class that the plaintiffs profess to represent, that is, all the citizens of the United States, will be called to testify before the Committee, is not sufficient to establish standing.

I think it is settled law that a plaintiff can not bootstrap his own standing by purporting to represent a class that includes certain members who will have standing to sue.

I cite for this proposition the Supreme Court's early 1960 opinion in the case of *Bailey v. Patterson*, which I think is dispositive in this regard.

Now, plaintiffs' claim that as taxpayers they have standing to challenge the discretionary expenditure of a Congressional appropriation is even more farfetched.

Plaintiffs make no challenge to the actual appropriation itself, but only to the incidental expenditure of this appropriation.

Nothing in the opinion of *Flast v. Cohen*, which is the leading opinion in this area, gives them any standing to make

this claim. In fact, the Flast case indicates that taxpayers have no standing to challenge such incidental expenditures as involved in the present case.

Now, if I may, Your Honor, I would like to say something about plaintiffs' motion for a preliminary injunction.

Of course, because plaintiffs have no chance of success in this case, as I hope that I have demonstrated, any preliminary relief is inappropriate.

But even if they had some sanguine prospect, relief would still be inappropriate.

It is an elementary principle that a preliminary injunction will not issue unless the plaintiffs can show that failure to grant it will cause them irreparable harm and unless they can show that the injunction is in the public interest.

They can meet neither of these tests. We cannot see how plaintiffs --

THE COURT: Counsel, the Court was hearing you solely on the basis of standing at this time, and on your motion to dismiss.

We will permit the petitioners to respond.

MR. HAMILTON: Thank you, Your Honor.

MR. BOTTOMLY: Your Honor, on the matter of standing, I would like to present an exhibit if I may, please?

THE COURT: Would you show it to the opponents, please?

THE DEPUTY CLERK: Plaintiffs' Exhibit No. 1 marked for identification.

(Plaintiffs' Exhibit No. 1 marked for identification.)

(Exhibit shown to Court.)

THE COURT: I believe this letter asks not to have his name mentioned.

MR. BOTTOMLY: That is correct.

THE COURT: I don't see how we can receive it if in good faith it was asked not to be mentioned.

MR. BOTTOMLY: Well, Your Honor, if the Court would impound it -- it is entirely up to counsel for respondents, if you are willing to do that.

But this gentleman is a member of the corporate petitioner, and is represented by its Board of Directors and officers who are the other petitioners.

THE COURT: I don't see how a suit can be brought by a named plaintiff who is not a named plaintiff, and asks that his name not be included or made public.

This is beyond the Court's understanding.

MR. BOTTOMLY: Well, Your Honor, I don't think, with all due respect, that it is far beyond the Common Cause actions that have been accepted by this court and are now pending, where the corporate non-profit organization was the principal petitioner and one member was joined as a member of a class of individuals --

in that case voters.

If I may, Your Honor, I will get my memorandum now and speak to you on the issue of class.

THE COURT: No.

MR. BOTTOMLY: And our standing.

THE COURT: The one member was one who would be likely to be injured or was injured.

MR. BOTTOMLY: Yes, Your Honor.

We believe that the dilution or invasion or failure to protect the rights of any citizen of the United States by a Congressional committee in the pursuit, or alleged pursuit of its legislative investigative function, dilutes and diminishes the rights of any citizen in the United States because it creates a precedent which may be used against any and all citizens who appear before subsequent committees.

THE COURT: First of all, we refer you to the Speech and Debate clause of the Constitution, Article I, Section 6.

MR. BOTTOMLY: Yes, Your Honor.

THE COURT: Which protects members of the committee from suits calculated to restrain the exercise of their official duties.

MR. BOTTOMLY: I think the history of that and the Federalist papers and its operation has been that it was intended to restrain civil actions in an attempt to impose liability upon members of Congress in the exercise of their legislative

duties or some injury that might be alleged by a citizen as a result of the exercise of those duties. They --

THE COURT: Are you not --

MR. BOTTOMLY: Excuse me.

THE COURT: Are you not offering to show that certain members of the class would be injured in the exercise of the Congressional duties?

MR. BOTTOMLY: No, Your Honor.

We are not asking for any monetary damages. We are not claiming any liability on the part of any of the respondents to us as individuals, or to members of the class we represent.

We are representing that their conduct should be reviewed by the court for the reasons stated in our petition, that they are subject to review by the court, that the actions of Congress are repeatedly reviewed by the courts, and that the citation of the clause by the respondents to avoid review of committee activity is not supported by a whole line of cases in which the court reviewed, for example, House Un-American Activities procedures and conduct, and, as Your Honor well knows, there is a very long line of such cases.

The court has reviewed the Army McCarthy hearings in which members of the legislature had to respond to the action of the court.

It is in that context. We are not seeking any personal damages from any individual respondent. We are trying to

bring before the court our contentions that they have acted in a manner which damages the constitutional guarantees of the individuals under due process, that de facto, the record of the Select Committee will show that they have usurped the sole power of the House to impeach the President.

One quotation --

THE COURT: Well, now, I am sorry, but the Court doesn't understand that there is any impeachment proceeding going on.

MR. BOTTOMLY: I said de facto, Your Honor, and I base it on the statement of the Vice Chairman repeatedly made that his main interest in the hearings is: What did the President know, when did he know it, and what did he do about it?

Now, if his inquiry is directed solely to the conduct of the President of the United States, we submit respectfully to the Court, that it amounts de facto to an impeachment proceeding.

THE COURT: Let's get back to the parties in your action, since it is alleged that they lack standing.

Now, I would have to call upon you at this time to either enter the gentleman's name as a party to the action or that the Court would not be able to consider it.

MR. BOTTOMLY: Rabbi Korff has authorized me to enter his name as a party, Your Honor.

THE COURT: Although he says in his letter he does not wish it?

RABBI KORFF: If I may respond. He did not --

THE COURT: Excuse me. I am afraid you can't talk from back there. We can't hear you.

You may come forward, if indeed your counsel wants you to. It wasn't anticipated we would take any testimony, so I was directing the question to counsel for the organization. You are one of the plaintiffs, I believe.

RABBI KORFF: Yes, Ma'am.

THE COURT: I was simply asking that either the gentleman be named a party plaintiff, or not be, and I didn't know how the Court could accept it when he has asked not to be named.

It is that simple.

MR. BOTTOMLY: Your Honor, by leave of the Court, if Rabbi Korff could address Your Honor on this subject, because the letter is addressed to him.

I don't feel authorized to speak.

RABBI KORFF: As Your Honor will note, Mr. Colson made a contribution of \$5.00. The only reason, and he explains it in his letter, why he does not wish us to use him as sponsor is because he might be a witness before the Senate Select Committee. He so spells it out.

But any contributor to our cause is a member, and so as far as we are concerned, Mr. Colson is a member.

While I am at this pulpit for a moment, Your Honor, want to point out that I look upon any court as a sanctuary, and

when I am here I feel as if I am in a sanctuary.

MR. BOTTOMLY: If I may, Your Honor, a sponsor in the organization is one who gives Rabbi Korff authority to use his or her name in the advertisements which the organization has caused to be printed in various papers throughout the United States, and paid for by the proceeds or from contributors such as this gentleman.

THE COURT: The Court understands at this time you wish to amend your pleadings to include Mr. Colson's name, or not?

MR. BOTTOMLY: Those are my instructions, yes, Your Honor.

THE COURT: Now, I would like to direct your attention to the ability to sue the members you filed suit against, the Senate Select Committee on Presidential Campaign Activities, and each and every member thereof.

MR. BOTTOMLY: In addition to the remarks I have already made about the Speech and Debate clause? Are you referring to the class action aspect of the case, Your Honor?

THE COURT: No. I am referring primarily to the prohibition against same by the Constitution of the United States.

MR. BOTTOMLY: Well, the Speech and Debate clause of the United States Constitution was intended to and does immunize Congressmen and their aides from liability for their actions --

THE COURT: Then that means they can't be sued, isn't that correct?

MR. BOTTOMLY: No, Your Honor, not in our judgment. It means that they have no liability. They have no economic consequences.

It is analogous to the criminal immunity which members of Congress have going to and from sessions of Congress, and it is a very limited --

THE COURT: But it states specifically that it protects the members of the committee from suits calculated to restrain the exercise of official duties.

Now, isn't that exactly what this case is?

MR. BOTTOMLY: Well --

THE COURT: It is an attempt to restrain the members of the Senate Committee from the exercise of their Senatorial duties?

MR. BOTTOMLY: No, Your Honor, it is not.

I think the injunction is very carefully worded, as is the petition, that all we seek in these orders is restraint from public hearings.

We are not at this time putting forth any argument to restrain investigation by the Committee.

Our draft orders which are put before Your Honor refer constantly to public hearings only.

We are not in any way trying to restrain them from what we consider -- and this goes to the merits of the case, of course -- the proper exercise of their legislative functions,

and in that connection, Your Honor, which, of course, in order to have you act favorably on the preliminary injunction, it is incumbent on us to at least attempt to persuade you that we have some merit to our case.

In that connection, I would like to read a portion of our memorandum.

THE COURT: Now, the Court has it before it. Is that what you have filed or what is coming?

MR. BOTTOMLY: No, this is new material, Your Honor, which we wrote in response to the --

THE COURT: Which we do not have yet?

MR. BOTTOMLY: No, Your Honor, just simply because of the typing.

This is an addendum which is respectfully submitted for consideration with the memorandum submitted with and in support of the motion of petitioners for a preliminary injunction, and in anticipation of a motion to dismiss which respondents informed counsel for the petitioners they would file on September 21, 1973.

THE COURT: Will you talk a little louder, please?

MR. BOTTOMLY: Yes, Your Honor.

The Court has jurisdiction of this action. A distinct basis of jurisdiction is that provided by 28 U.S.C. Section 1331(a) over Federal questions where the amount in controversy exceeds \$10,000.

The chief aim of the jurisdictional amount limitation in Section 1331 is to avoid consuming the resources of the Federal courts in resolving petty controversies.

THE COURT: You said that it didn't involve money, didn't you?

MR. BOTTOMLY: It involves public funds, Your Honor. It involves the taxpayers' funds and, as we have alleged in our pleading, the conduct of these hearings in private would be substantially less expensive to the taxpayers and more productive to the legislative purpose than if they are held in public.

THE COURT: Is it your thought that this Court has the authority to tell not only the Senate Committee how it shall conduct its hearings, but with specificity?

MR. BOTTOMLY: Well, I think that, yes, Your Honor, it can speak only in very broad terms, and all we are asking the Court to do is to speak in broad terms as comparing a private or executive session with the public session.

Now, the respondents rely heavily on McGrain v. Daugherty as being dispositive of the prayers of the petitioner because, it is alleged, it includes argument substantially similar to the arguments of petitioner.

There is a similarity in some of the arguments but we submit, Your Honor, that the facts relating to McGrain v. Daugherty and the instant case are substantially different.

28 U.S.C. Section 1331 and 1343(4) did not exist in

1927. Rule 23(b)(3) did not exist in 1927.

Radio broadcasting was a relative infant in 1927.

Television broadcasting did not exist in 1927.

The technical and legal developments since 1927 vastly increased the potential of any public hearing of Congress to establish precedents impairing and irreparably damaging the constitutional rights of citizens of the United States.

Concomitant with those technical developments, but necessarily lagging behind, has been the establishment of statutory and case law and rules of procedure to continue the protection of the constitutional rights of all citizens of the United States.

Broad judicial acceptance of the wisdom and the necessity of the expansion of who could ask the court to protect those rights is evident in the cases cited in the memorandum of petitioners in support of preliminary injunction and addendum thereto.

That this particular court is a leader in recognition and nurturing that growth has been most recently demonstrated by the Common Cause cases cited in the memorandum of petitioners.

This case constitutes a logical extension of those continuing developments to protect citizens of the United States from the tyranny of technological advances.

Respondents argue on page seven of their memorandum in support of motion to dismiss that the public has a right to

be accurately informed.

There is no support for the accompanying contention of respondents that the right of the public to information overrides the constitutional protection of the citizens of the United States.

The development of those Congressional procedures discussed in the addendum to the memorandum of petitioners in support for preliminary injunction is contra to the contentions of respondents in this regard.

The informing function of Congress must be and, in the case of the House of Representatives, has been circumscribed with protections of the individuals.

A witness before a Congressional Committee is entitled to the protections of due process of law, Watkins v. United States.

The procedures necessary to assure that protection must adapt and have adapted to changing technology.

The Constitution and its implementation are not static. The power of inquiry must be exercised with due regard to the rights of witnesses.

This action is not a rash and belated action. It has been commenced in good faith as soon as possible as the facts upon which it is based became known.

It is consistent with and analogous to actions by a similarly chartered non-profit corporation presently pending in

this court.

Respondent Sam J. Ervin has stated in effect that the subject matter of the investigation of the Select Committee is a more traumatic experience to the United States than was the Civil War.

In that connection, Your Honor, and in response to the contention in the motion to dismiss, the right of cross-examination has in the past been granted to some witnesses in front of Congressional investigating committees --

THE COURT: That may have been done but there is no requirement for it, counsel.

MR. BOTTONLY: May it please the Court, I think the continuity of the argument I hope is persuasive, that it all hopefully ties together.

That was specifically done during the Army McCarthy hearings. Special rules for this unusual proceeding were in fact adopted by the Committee on Government Operations.

The statutes and rules of Congress relative to conducting and broadcasting hearings appear to be important on this point.

Title 2 of the U. S. C. Section 190a-1(b) provides -- quote -- each hearing conducted by each standing, select, or special committee of the Senate, except the Committee on Appropriations, shall be open to the public except when the committee determines that the testimony to be taken at that hearing

may relate to a matter of national security, may tend to reflect adversely on the character or reputation of the witness or any other individual, or may divulge matters deemed confidential under other provisions of law or Government regulation.

Whenever any such hearing is open to the public that hearing may be broadcast by radio or television or both under such rules as the committee may adopt.

In its present form 2 U.S.Code, 190a-1(b) was enacted as Section 112(a) of public law 91-510, Legislative Reorganization Act of 1970, passed by the House of Representatives October 8, 1970, and the Senate, October 6, 1970, to be effective in January 1971.

The House bill H.R. 17654 was passed in lieu of the Senate bill, hereinafter at times referred to as the bill.

The House report No. 91-1215 is set out in 3 United States Congressional Administrative News 1970, Volume 2, at page 4417.

Section 112 of the bill relates to open hearings of Senate and House standing, select and special committees.

Section 112(b) of the bill provides that each hearing conducted by each house standing, select and special committee, shall be open to the public except when the committee by a majority vote determines otherwise.

Section 116 of the bill pertains to the broadcasting on radio and television of the hearings of Senate and House

standing, select, and special committees.

Section 116 (b) of the bill adds a new clause, 33, to House Rule 11, providing for the coverage of House committee hearings by radio and television broadcast and still photography.

Quoted herewith is a portion of House Report No. 91-1215, said new clause 33, through paragraph (f)(2) thereof.

With respect to the House Section 116(b) --

THE COURT: Do you want to just confine it to the Senate since that is the only one we have before us at the moment?

MR. BOTTOMLY: Your Honor, the burden of our case is that the Senate lags behind the House and that in the protection of the rights of individual citizens who appear before public hearings, it is --

THE COURT: Excuse me. This doesn't apply to the Senate, what you have been reading?

MR. BOTTOMLY: I beg your pardon?

THE COURT: It doesn't apply to the Senate. Is that what you are saying?

MR. BOTTOMLY: I am saying that it is House rules and I am saying, Your Honor --

THE COURT: I guess we will have to go by the Senate rules in a case involving the Senate.

MR. BOTTOMLY: Well, Your Honor, if I may, one of the

problems which we must address ourselves to when we request a preliminary injunction is that we are not imposing an undue burden on the respondents and I offer this evidence, if you will, this documentation, to support the contention that a co-equal branch of the Congress not only does not consider what we ask a burden, but it requires it of its committees when they are in public session and on television.

That is the premise upon which I offer this to the Court, Your Honor.

THE COURT: This is a request for a preliminary injunction and we feel rather limited in scope as to how far we can go on that, and we would not certainly be able to go far afield in considering something that does not apply to the Senate.

MR. BOTTOMLY: Well, Your Honor, I think it applies to your decision under the Perry case on a preliminary injunction in relation to whether it is an undue burden on the respondents and whether the expeditious relief is reasonably requested, whether the relief we are asking is reasonable, is necessary, and whether or not the burden that relief would impose on the respondent is onerous, and we submit, Your Honor, that the House Rule 11, clause 33, is evidence that a co-equal branch of Congress does not consider it burdensome.

We don't say that the House Rule applies to the Senate. We submit it to Your Honor hopefully to be persuasive

that the relief we seek is not burdensome on the Senate.

You do not wish me to continue to read?

THE COURT: I do not wish to hear any more of the House Rules.

MR. BOTTOMLY: All right, Your Honor.

Your Honor, there has been filed -- if I may, unless you wish to direct me to some other specific point at this time -- I would like to bring up another matter.

THE COURT: All right. You may go ahead.

MR. BOTTOMLY: We have been hampered considerably, Your Honor, by the fact that the respondents refused to produce information and documents which were requested by a duly issued subpoena of this court.

The respondents served us yesterday with a motion to postpone their response to the subpoena. We believe that the material that would be made available to the court by a positive response to the subpoena would be most helpful to it in making a decision about the preliminary injunction requested by the petitioners.

With your permission, Your Honor, I would like to read to you our memorandum in opposition to the postponement.

THE COURT: Has it arrived yet? I would like it filed.

MR. BOTTOMLY: This is the one -- the subpoena. Their motion, I presume --

THE COURT: We haven't reached that point at this

stage, so we will not go into it at this time, since at this time the question is whether or not this action may be maintained.

MR. BOTTOMLY: Well, we submit, Your Honor, that the production of those documents is necessary to a decision on that by the Court and if by your direction to me you are instructing me not to submit our memorandum in opposition at this time --

THE COURT: You may file it, indeed, if you like.

MR. BOTTOMLY: For your consideration at this time, I would like to take exception to that, Your Honor.

THE COURT: You may file it, certainly, in the case. We are not considering it at this time.

MR. BOTTOMLY: Well, I would like to urge again, Your Honor, that the production of these documents is, in our judgment, essential to the Court for it to make a decision on our preliminary prayers, for preliminary injunction, and I would like to present our arguments in that regard to the Court for its consideration.

THE COURT: The Court must first of all consider whether or not the petitioners have standing and, secondly, whether or not the Constitution permits them to attempt to enjoin the duties of the Senators while they are actually serving in the Senate.

The Court will have to resolve that against the petitioners and, therefore, I don't believe it would be necessary for us to consider the question of subpoena duces tecum.

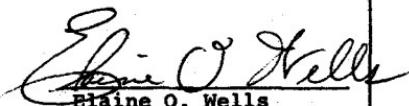
Accordingly, the suit is dismissed.

MR. BOTTOMLY: I give the Court notice of appeal,
Your Honor.

THE COURT: Certainly.

* * * * *

The foregoing is certified to be the official
transcript of the proceedings indicated.


Blaine O. Wells
Official Court Reporter

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CITIZENS' COMMITTEE FOR)
FAIRNESS TO THE PRESIDENCY, INC., et al)
Plaintiffs)
v.) Civil Action
SENATE SELECT COMMITTEE ON PRESIDENTIAL)
CAMPAIGN ACTIVITIES, et al) No. 1758-73
Defendants)

FILED

SEP 21 1973

ORDER

JAMES F. DAVEY, Clerk

These matters having come before the Court on plaintiffs'

Motion for Preliminary Injunction and defendants' Motion to Dismiss and
the Court being of the opinion that plaintiffs' motion should be denied and
defendants' granted, it is hereby this 21 day of September, 1973,

ORDERED, that plaintiffs' Motion for Preliminary Injunction
be and is denied, and it is further

ORDERED, that defendants' Motion to Dismiss be and is granted.

June L. Green
United States
District Judge

CIVIL SUBPOENA

United States District Court
for the
District of Columbia

NATIONAL CITIZENS' COMMITTEE FOR
 FAIRNESS TO THE PRESIDENCY, INC., et al
Plaintiff.

SENATE SELECT vs. COMMITTEE ON PRESI- CIVIL ACTION NO. 1758-73
 DENTIAL CAMPAIGN ACTIVITIES, et al
Defendant.

To: Senate Select Committee on Presidential Campaign Activities
 (serve Hon. Sam J. Ervin, Jr., Chairman)

You ARE HEREBY COMMANDED to appear in (this court) (~~the Clerk of~~)

to give testimony in the above-entitled cause on the 21st day of September, 1973,
 at 2:00 o'clock P. m. (and bring with you)

See Attachment hereto which is made a part hereof

and do not depart without leave.

ROBERT M. STEARNS, Clerk

By *Stephen Leonard*

Deputy Clerk.

Date September 21, 1973
 Stephen Leonard, Federal Bar Bldg.
 Washington, D. C. 20006
 Tel. 393-1565 Attorney for Plaintiff.
 (202) Defendant.

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to him and tendering to him the fees for one day's attendance and mileage allowed by law, on the _____ day of _____, 19_____, at _____

Dated _____

Subscribed and sworn to before me, a _____ this _____ day of
 _____, 19_____

NOTE.—Affidavit required only if service is made by a person other than a U. S. Marshal or his deputy.

CIVIL SUBPOENA - UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ATTACHMENT TO:

NATIONAL CITIZENS' COMMITTEE FOR FAIRNESS TO THE PRESIDENCY, INC., et al

CIVIL ACTION NO. 1758 - 73

v.

SENATE SELECT COMMITTEE ON RESIDENTIAL ACTIVITIES, et al

and bring with you)

1. Any and all records, memoranda and transcripts of conferences and discussions (formal and informal) and testimony relating to deliberations, considerations, discussions and determinations by Defendant Committee regarding procedures to be employed by Defendant Committee pursuant to Title 2 United States Code, Sec. 190 a-1, and in particular Title 2 United States Code, Sec. 190 a-1(b).
2. A copy of the written statement of proposed testimony of John W. Dean III filed with the Clerk of Defendant Committee and the digest thereof prepared by the staff of Defendant Committee pursuant to Title 2 United States Code, Sec. 190 a-1. (c).
3. Any and all records, memoranda and transcripts of conferences and discussions (formal and informal) and testimony relating to deliberations, considerations, discussions and determinations by Defendant Committee and its members and others:
 - (a) relating to or concerning the relationship between the House of Representatives and the Senate regarding the sole power delegated to the House of Representatives for impeachment granted by Article I, Section 2 of the Constitution and the sole powers granted to the Senate pursuant to Article I, Section 3 of said Constitution,
 - (b) relative to the relationship of the proceedings of the Defendant Committee and the Judicial Branch of the United States of America concerning the possible interference of proceedings of the Defendant Committee with Article III, Section 2 of the Constitution of the United States, and
 - (c) providing for the protection of the rights of witnesses and any other persons under due process of law as set forth in Article 5 of the Articles in Addition to and Amendment of the Constitution of the United States of America.

NUMBER
614

STEPHEN LEONARD
408 FEDERAL B BLDG.
WASHINGTON, D. C. 20006

DATE September 20 1973

153/540

DAY
TO THE
ORDER OF

Sam J. Ervin, Jr.

\$ 20.80

Twenty dollars and 80/100

DOLLARS

The RIGGS NATIONAL BANK
of WASHINGTON, D. C.
FEDERAL OFFICE
1750 PENNSYLVANIA AVENUE, N. W.

Subpoena-witness fee

10540-00031 11-03046757

Stephen Leonard

1879

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

FILED SEP 24 1973

JAMES R. DAVEY
CLERK

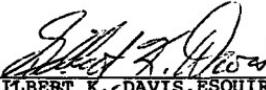
NATIONAL CITIZENS' COMMITTEE FOR)
FAIRNESS TO THE PRESIDENCY, INC. et. al.)

vs.) CA No. 1758-73

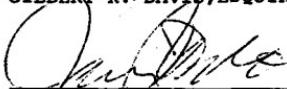
SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES et. al.)

NOTICE OF APPEAL

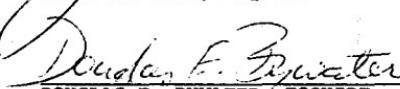
Notice is hereby given that Petitioners above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the dismissal of the petition entered in this action on the 21st day of September, 1973.



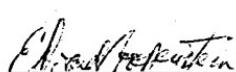
GILBERT K. DAVIS, ESQUIRE



JAMES R. TATE, ESQUIRE



DOUGLAS E. BYWATER, ESQUIRE
DUVALL, TATE, BYWATER McNAMARA and
DAVIS
10560 Main Street
Fairfax, Virginia 22030
591-4900



EDWARD COOPERSTEIN, ESQUIRE
Taunton, Massachusetts

IN THE SUPREME COURT
OF THE
UNITED STATES

NATIONAL CITIZENS' COMMITTEE FOR)
FAIRNESS TO THE PRESIDENCY, INC. et. al.)

vs.

) CA. No. A - 319

SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES et. a.)

PETITION FOR INJUNCTION
PENDING APPEAL

Come now the Petitioners, by counsel, and respectfully move this Court, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, to grant an injunction during the pendency of the appeal in the above-styled case, and as reason therefore state as follows:

1. On September 21, 1973, the District Court for the District of Columbia, the Honorable June Green presiding, dismissed the petition for declaratory and injunctive relief.

2. The reason stated by the Court below for the dismissal was an asserted lack of "standing" to bring suit.

3. Petitioners have standing to assert this claim, and to represent all members of the Fairness Committee, and all United States citizens who are in Petitioners' class. See the attached copies of the Pleadings filed in the Court below, and the Points and Authorities cited hereafter.

ARGUMENT

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment to the Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . ."

No branch or instrumentality of The United States Government, including The United State Senate, ought to be allowed to embark upon a deliberate, concerted effort to deprive citizens of The United States of their rights under the Fifth and Sixth Amendments.

The Senate Watergate Committee, pursuant to its power and authority as a part of The Government of The United States, subpoenas witnesses to testify before it. These hearings are publicized by the media, including live television and radio. Witnesses before this Committee have in the past, with prior knowledge of the Committee, made allegations of criminal conduct against members of Petitioners' class. These witnesses were not subject to cross-examination by the accused members of Petitioners' class nor was their testimony subject to the rules of evidence.

Petitioners have cause to believe that on the 24th day of September at 10:00 a.m. The Senate Watergate Committee will continue hearings conducted in the manner as above described. If allowed to continue, no member of Petitioners' class, who may be accused of criminal conduct, will be able to obtain a fair trial as guaranteed to each citizen of The United States by the Fifth and Sixth Amendments. The probability that a prospective juror will have seen and heard an accusing witness testify, without the Constitutional safeguards of cross-examination, confrontation, and the rules of evidence is exceedingly great.

Enjoining The Senate Watergate Committee to prevent its witnesses from publicly accusing other citizens of criminal conduct, without the Constitutional safeguards, will not in any manner inhibit The Committee's right to gain the same information in private session; but will protect Petitioners from irreparable harm.

Wherefore, Petitioners pray that a Preliminary Injunction issue, enjoining The Senate Select Committee from publicizing the testimony of any witness that it has reasonable cause to believe will accuse a member of Petitioners' class of criminal conduct.

MAJOR POINTS AND AUTHORITIES

Jurisdiction:

Fifth Amendment, U.S. Constitution
(right to due process of law)

Sixth Amendment, U.S. Constitution
(right to trial by impartial jury)

28 U.S.C. 1343 (4)
any person can seek equitable relief
under any Act of Congress providing
protection of Civil Rights (e.g. 2
U.S.C. 190a - 1 (b))

Veller v. United States, 374 U.S. 109; Watkins v. United States, 354 U.S. 178; Sinclair v. United States, 279 U.S. 263; United States v. DeCarlo, 102 F. Supp. 597, 602; United States v. Rumely, 345 U.S. 41

(witnesses before Congressional Committees
are accorded due process rights; a fortiori
persons not present who may be accused of
criminal conduct should be accorded
procedural fairness in situations wherein
they have no opportunity to respond, and in
which the charges are sensationalized
broadcast to millions.)

Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619 (1971); Williams v. Rogers, 449 F. 2d 513 (8 Cir. 1971); Bethea v. Reid, 445 F. 2d 1163 (3Cir. 1971)

Federal personnel who deprive persons of their federal constitutional rights can be sued for damages and other (equitable and declaratory) relief, under 28 U.S.C. 1331, since such actions arise under the Constitution of the United States. Not only Fourth Amendment rights, but all federal constitutional rights are here protectable, including substantive and procedural due process, and the fair trial guarantees of the Fifth and Sixth Amendments. If the Executive Branch is subject to suit for violation of Fourth Amendment rights, the Legislative as a Co-Equal Branch of Government is likewise subject to restraint against the unlawful deprivation of rights under the Fifth and Sixth Amendments.

Standing :

Flast v. Cohen, 392 U.S. 83 (1968)

Federal taxpayer has standing to enjoin operation of portions of Elementary and Secondary Education Act of 1965 as violative of the Free Exercise and Establishment clauses of the First Amendment. Issue is whether Petitioner has alleged such a personal stake in the outcome as to assure that concrete adverseness which sharpens presentation of issues upon Court relies for illumination of difficult question.

Rule 23, Federal Rules of Civil Procedure
(pertains to class actions)

Association of Data Processing Service v.

Camp, et. al., 397 U.S. 150, 152-153, (1970)

(Petitioner has "injury in fact" and the injury must come within the "Zone of interests" which regulation or statute designed to protect.)

Sierra Club v. Morton, 92 S. Ct. 1361, 1367-68

(1972). (1) Injuries other than economic ~~are~~ are sufficient to give standing.

(2) An organization whose members are injured may represent those members in a proceeding for judicial reviews.

Carpenter v. Hall, 311 F. Supp. 1099 (E.D.Tex.

1970); Katz v. Carte Blanche Corp., 52 F.R.D. 510 (E.D. Pa. 1971). The fact that the class is numerous does not mitigate against allowance of the suit as a class action. In the instant case, all U.S. citizens face the prospect that the accusing finger may point to them, as the result of Respondents' manner of conducting the hearings.

Common Cause, et. al. v. Democratic National

Committee, et. al., 333 F. Supp. 803

(D.C. D.C. 1971); Common Cause, et. al.

v. Finance Committee to Re-Elect the President,

et. al. (D.C. D.C. Civil Action No. 1780 - 72); Common Cause v. Jennings (D.C. D.C. Civil Action No. 848 - 72 June, 1972).

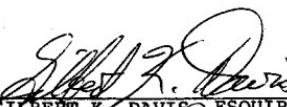
Common cause allowed to represent, among others, "all registered voters in the several states and the District of Columbia" in suit to obtain greater access for the voters to candidates' finances. The rights sought to be protected in this petition are as important as the right to vote.

Merits:

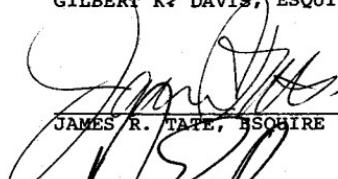
Perry v. Perry, 88 U.S. App. D.C. 337,
190 F. 2d 601, 602 (1951)
(balancing of damage to Petitioners against
conveniences of Respondents)

CERTIFICATE OF SERVICE

Counsel for Petitioners hereby certify that a copy
of this Petition was hand delivered to Counsel for Respondents
this 24th day of September, 1973.



GILBERT K. DAVIS, ESQUIRE



JAMES R. TATE, ESQUIRE



DOUGLAS E. BYWATER, ESQUIRE
DUVALL, TATE, BYWATER, McNAMARA
AND DAVIS
10560 Main Street
Fairfax, Virginia 22030
591-4900



EDWARD COOPERSTEIN, ESQUIRE
Taunton, Massachusetts

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2012

September Term, 19₇₃National Citizens' Committee for Fairness
to the Presidency, Inc., et al.,

Civil Action 1758-73

Appellants

United States Court of Appeals
for the District of Columbia Circuit

v.

Senate Select Committee on Presidential
Campaign Activities, et al.

FILED SEP 24 1973

HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; and Wilkey, Circuit Judge

O R D E R

On consideration of the petition for injunction pending appeal,
and of the memorandum in opposition to plaintiffs' motion for
preliminary injunctions and in support of defendants' motion to
dismiss, it is

ORDERED by the Court that the aforesaid petition for injunction
pending appeal is denied.

Per Curiam

For the Court:

Hugh E. Kline
Hugh E. Kline
Clerk

COPY

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

September 27, 1973

Gilbert K. Davis, Esquire
Duval, Tate, Bywater, McNamara & Davis
10560 Main Street
Fairfax, Virginia 22030

RE: National Citizens' Committee for Fairness
to the Presidency, Inc., et al., v. Senate
Select Committee on Presidential Campaign
Activities, et al., A-319

Dear Mr. Davis:

Your application for an injunction pending appeal in the above-entitled case was presented to Mr. Chief Justice Burger, who has endorsed thereon the following:

"Denied. 9/26/73.

W. E. B."

Kindly advise other counsel of this action.

Very truly yours,

MICHAEL RODAK, JR., Clerk ..

By

lab

Arthur G. Christean
Deputy Clerk

cc: Samuel Dash, Esquire
Chief Counsel
Senate Select Committee on
Presidential Campaign Activities
United States Senate
Washington, D. C. 20510

HUGH E. KLINE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

January 31, 1974

In Re: No. 73-2012 National Citizens' Committee for
Fairness to the Presidency, Inc., et al. v.
Senate Select Committee on Presidential Cam-
paign Activities, et al.

Douglas E. Bywater, Esquire
10560 Main Street
Fairfax, Virginia 22030

Dear Mr. Bywater:

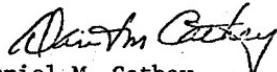
The docket in the above case reflects that an order was entered on September 24, 1973, denying the petition for injunction pending appeal.

Also, the docket reflects that on that same date a certified record of certain pleadings was prepared and hand-delivered to the Supreme Court. To my knowledge this office has not received notice from the Clerk's Office of the Supreme Court that a petition for writ of certiorari has been filed.

Would you kindly advise me of the status of the proceedings in order that our docket records may be kept up to date.

Very truly yours,

Hugh E. Kline, Clerk

By: 
Daniel M. Cathey
Deputy Clerk

DMC/pm

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2012**September Term, 19 73**

Civil Action 1758-73

**National Citizens' Committee for Fairness
to the Presidency, Inc., et al.,****Appellants****United States Court of Appeals
for the District of Columbia Circuit**

v.

FILED APR 29 1974**Senate Select Committee on Presidential
Campaign Activities, et al.****HUGH E. KLINE
CLERK****Before: Bazelon, Chief Judge and Wilkey, Circuit Judge.****O R D E R****On consideration of appellants' unopposed motion to
dismiss, it is****ORDERED by the Court that the motion is granted and
this appeal is hereby dismissed.****The Clerk is directed to transmit a certified copy of
this order to the Clerk of the District Court as promptly
as the business of his office permits.****Per Curiam**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES MISC. NO. 70-73

(John J. Ragan)

Friday, October 5, 1973

BEFORE THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

RONALD ROTUNDA, ESQ., On Behalf of the Senate Select Committee

PHILLIP HERRICK, ESQ., On Behalf of John J. Ragan.

NICHOLAS SOKAL
OFFICIAL COURT REPORTER
4800 - F UNITED STATES COURT HOUSE
WASHINGTON, D. C. 20001
426 - 7454

P R O C E E D I N G S

(10:00 a.m.)

THE COURT: All right.

MR. ROTUNDA: Good morning, Your Honor.

On behalf of the Select Committee we would like to apply for immunity for Mr. John J. Ragan. As our application which we have already submitted to the Court indicates, on September 12 the Select Committee voted to grant Mr. Ragan immunity. On September 14 the Attorney General and his designated special prosecutor was notified. Ten days have elapsed and the government has not asked for a twenty-day deferral. The application indicates the other procedural requirements have been met and we respectfully request that the order issue.

THE COURT: Have you examined the papers, Mr. Herrick?

MR. HERRICK: Yes, I have, Your Honor.

THE COURT: Are they in proper form?

MR. HERRICK: Yes, Your Honor.

I would like to make one short reservation, if I may. Just in case it ever becomes important and I don't think it ever will, I would like to reserve and not waive my right to claim that the Committee is acting without jurisdiction in this case because it is primarily interested in Mr. Ragan because of an incident in 1969 which jurisdiction of course as Your Honor knows is limited to the Presidential election of 1972. And with that short statement of reservation there is no problem, we will

have Mr. Ragan here and he will testify.

THE COURT: All right. Is that agreeable to you?

MR. ROTUNDA: Yes, Your Honor.

For the record, the Select Committee always contended that the '72 election started the day after -- the '72 campaign started the day after the '68 election. I think that is probably the most realistic view.

THE COURT: Now this is something that will have to be decided by the Committee, won't it, in executive session?

MR. ROTUNDA: Yes, Your Honor.

MR. HERRICK: I don't want anything to be construed as a waiver, that's all.

MR. ROTUNDA: We have no objection, Your Honor.

THE COURT: All right.

(The Court signs document.)

* * *

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

Nicholas Sokal
NICHOLAS SOKAL
Official Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT
COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES :

Misc. No. 70-73

ORDER CONFERRING IMMUNITY UPON AND COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION FROM
JOHN J. RAGAN

FILED

JCT 5 1973

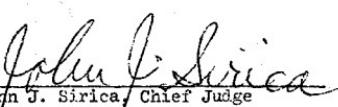
JAMES F. DAVEY, Clerk

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon John J. Ragan and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by §6005 have been duly followed, it is hereby this 5th day of October, 1973.

ORDERED that the said Witness in accordance with the provisions of Title 18, United States Code, section 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that the said Witness appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or for any other information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except for perjury, giving a false statement, or otherwise failing to comply with this ORDER.


John J. Sirica, Chief Judge
United States District Judge


James P. Capitanos

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE APPLICATION OF THE
UNITED STATES SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES

MISC. NO. 70-73

(John H. Meier)

Thursday, December 6, 1973

BEFORE THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

RONALD D. ROTUNDA, U.S. Senate Select Committee

ROBERT H. WYSHAK)
LILLIAN W. WYSHAK) for John H. Meier

NICHOLAS SOKAL
OFFICIAL COURT REPORTER
4800 - F UNITED STATES COURT HOUSE
WASHINGTON, D. C. 20001
426 - 7454

P R O C E E D I N G S

(2:00 p.m.)

THE COURT: Good afternoon.

MR. ROTUNDA: Good afternoon, Your Honor. I am Ronald D. Rotunda, Assistant Counsel, U.S. Senate Select Committee on Presidential Campaign Activities.

On behalf of that committee we are applying for an order conferring immunity upon and compelling testimony and the production of information from John H. Meier pursuant to Title 18 U.S. Code, Section 6002 and 6005. We already submitted an application to the Court and served it upon the Special Prosecutor, and Mr. Meier's attorneys indicate that all procedural requirements of the statute have been met.

The Special Prosecutor asked for and received a twenty day deferral in issuance of the order in addition to ten days we gave him and those entire thirty days expired and therefore move that the order be granted.

In addition, Your Honor, Mr. Meier's attorneys, Lillian and Robert Wyshak are here before the Court. Mrs. Wyshak represented to me she is a member in good standing of the Bar of California and the U.S. Supreme Court. Mr. Wyshak has represented to me he is a member of the California and Massachusetts Bars as well as the U.S. Supreme Court and I ask on those representations they be admitted for purposes of this oral argument.

THE COURT: They may be admitted.

Counsel, step forward.

MR. WYSHAK: Good afternoon, Your Honor.

THE COURT: Have both of you examined the papers filed in this case?

MR. WYSHAK: Yes, Your Honor.

THE COURT: Do you find them in proper form?

MR. WYSHAK: They appear to be, Your Honor.

THE COURT: You have no objection to the Court signing the order?

MR. WYSHAK: We have no objection except in one respect that this morning we filed an application for an order conferring immunity from service of process on Mr. Meier while he is attending proceedings and conferring with investigators of the Senate Select Committee. I have here a handwritten waiver which I would like to file at this time waiving his appearance today. (handed to the Court).

THE COURT: This may be filed. This waives Mr. Meier's appearance today.

MR. WYSHAK: Yes, Your Honor. And I understand Your Honor has not had an opportunity to look at this application that we filed this morning. I feel that the relief therein requested should be included in the order granting him immunity.

THE COURT: Now, Mr. Rotunda, does your office object to the relief?

MR. ROTUNDA: I am authorized to state that we take no position on Mr. Wyshak's application.

THE COURT: Let me see it. (Handed to the Court)
You can't get a better authority than Judge Holtzoff.

I will sign the order.

MR. WYSHAK: Thank you, Your Honor.

THE COURT: Do you have a separate order about the
immunity and service of process?

MR. ROTUNDA: No, I don't, Your Honor.

THE COURT: Suppose you prepare a copy and submit it
to the clerk.

MR. ROTUNDA: Very well, and we will try to lodge it
this afternoon.

THE COURT: All right.

* * *

CERTIFICATE

It is certified the foregoing is the official
transcript of proceedings indicated.

Nicholas Sokal
NICHOLAS SOKAL
Official Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT COMMITTEE : Misc. No. 70-73
ON PRESIDENTIAL CAMPAIGN ACTIVITIES

FILED

DEC 6 1973

F. DAVEY, Clerk

ORDER CONFERRING IMMUNITY UPON AND COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION FROM JOHN H. MEIER

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon John H. Meier (the "Witness") and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by § 6005 have been duly followed, it is hereby this 6th day of December, 1973,

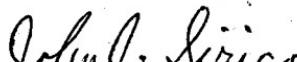
ORDERED that the said Witness in accordance with the provisions of Title 18, United States Code, section 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that the said Witness appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or for any other information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except for perjury, giving a false statement, or otherwise failing to comply with this ORDER.

A TRUE COPY

JAMES F. DAVEY, Clerk

By James F. Capitanio
Deputy Clerk


 John J. Sirica, Chief Judge
 United States District Judge

1
2
3 UNITED STATES DISTRICT COURT
4 FOR THE DISTRICT OF COLUMBIA5
6 In the Matter of the Application of :
7 UNITED STATES SENATE SELECT : Misc. No. 70-73
8 COMMITTEE ON PRESIDENTIAL :
9 CAMPAIGN ACTIVITIES :10 APPLICATION FOR ORDER CONFERRING IMMUNITY
11 FROM SERVICE OF PROCESS ON JOHN H. MEIER12 The witness, John H. Meier, by and through his counsel,
13 Wyshak & Wyshak, by Robert Wyshak and Lillian Worthing Wyshak,
14 hereby applies to the Court for an order conferring immunity on
15 John H. Meier from service of any process, whether summons, subpoena
16 warrant or otherwise, while conferring with or testifying before
17 the Senate Select Committee on Presidential Campaign Activities
18 or their investigators and while travelling from his home in Canada
19 and back for such purposes.

20 Dec. 6, 1973

21 WYSHAK & WYSHAK

22 9255 Sunset Blvd., #1125
23 Los Angeles, Cal. 90069
24 213-273-2044

R.H.Wyshak


Lillian Worthing Wyshak
25 Lillian Worthing Wyshak

26 POINTS & AUTHORITIES

27 Counsel has found only one case involving a Congressional Com-
28 mittee which did afford the witness immunity. *Youpe v. Strasser*, 113
29 F. Supp. 289 (D.D.C. 1953) appeal dis'd as premature, 213 F.2d 613 (D.C.Cir.
30 1954). A xerocopy of said opinion is attached hereto. Immunity has
31 been similarly made available to a witness before a State Bar. See *Velkov*
32 *v. Superior Court*, 40 Cal. 2d 289.33 Consistent with these authorities, the Court should in its
34 Order conferring immunity under 18 USC §§ 6002, 6005, grant immunity
35 to the witness as set forth above.

YOUPE v. STRASSER
Cite as 113 F.Supp. 289

289

ry, together with satisfactory evidence showing positive action on his part to effectuate such intent. In this case the government stands as a stakeholder. To complete the change of beneficiary is but a ministerial act. *Collins v. United States*, 10 Cir., 161 F.2d 64.

In the circumstances plaintiff should have judgment.

Judgment is granted in favor of plaintiff and against defendants in the sum of \$500 dollars.



YOUPE et al. v. STRASSER et al.

Civ. No. 1492.

United States District Court,

District of Columbia.

June 16, 1953.

Proceeding upon motion to quash service of summons and complaint which were served upon nonresident while he was in attendance as congressional witness. The District Court, Holtzoff, J., held that witness was immune from such service.

Motion granted.

1. Federal Civil Procedure \Leftrightarrow 415

Immunity of nonresident witness from service of process applies not only to witnesses before judicial tribunal but also to witnesses before bodies of legislative branch of government.

2. Federal Civil Procedure \Leftrightarrow 415

Nonresident, who was in attendance as witness before congressional committee, was immune from service of summons and complaint.

Marvin J. Sonosky, Washington, D. C., for the motion.

J. R. Thompson, Jr., Washington, D. C., opposed.

HOLTZOFF, District Judge.

This is a motion to quash service of summons and complaint on a non-resident while the latter was in attendance as a witness

before a committee of Congress. The ground of the motion is that such a witness is immune from service of civil process while in attendance as a witness and while traveling to and from the place where he was called upon to testify.

Admittedly, a witness who is a non-resident and who appears before a judicial tribunal has such an immunity. It was held, however, by the Supreme Court of the District of Columbia in 1874 in *Wilder v. Welsh*, 8 D.C. 566, 1 MacArthur 566, that the immunity does not extend to a witness in attendance before a Congressional committee. The opinion is a very short per curiam opinion and the only ground given for the decision is that the privilege of a witness before a Congressional committee stands on the same footing as the privilege of members of that body, and that this exemption does not extend to freedom from service of civil process.

[1, 2] This Court is unable to see the cogency of that reasoning. But, be that as it may, the Court of Appeals for the District of Columbia, in *Engle v. Manchester*, 46 App.D.C. 220, applied such an exemption to a witness appearing at a hearing before an administrative official. In other words, the immunity of a non-resident witness to service of process applies not only to witnesses before a judicial tribunal, but also to witnesses before bodies of the executive branch of the government. This being the case, no reason appears for not applying this immunity to witnesses appearing before the legislative branch of the government. As a matter of fact, there is good reason for applying the immunity to witnesses before any one of the three branches. The investigative power of Congress constitutes important implementation of its legislative and appropriating functions, and there is as good a reason for facilitating the application of this process by giving the above-mentioned exemption to witnesses before Congressional bodies as there is for granting it to witnesses before the judicial and executive branches of the government.

In view of these considerations, the Court holds that the immunity applies and, therefore, motion to quash service will be granted.

1901

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES : Misc. No. 70-73

ORDER CONFERRING IMMUNITY FROM SERVICE
OF PROCESS ON JOHN H. MEIER

FILED ✓
JAMES F. DAVEY, Clerk

Good cause appearing therefor,

IT IS HEREBY ORDERED that while he is conferring with or testifying before the Senate Select Committee on Presidential Campaign Activities or their investigators and while he is travelling to and from his home in Canada for such purposes, JOHN H. MEIER shall be immune from service of any writ or process, whether summons, subpoena, warrant or otherwise, and any papers or records delivered by John H. Meier or his counsel to the Senate Select Committee on Presidential Campaign Activities or its investigators shall be similarly immune..

December 12th, 1973

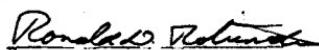

U.S. District Judge

A TRUE COPY

Submitted by
WYSHAK & WYSHAK
9255 Sunset Blvd.
Los Angeles 90069
213-273-2044

JAMES F. DAVEY, Clerk,
By 
James P. Capitanio
Deputy Clerk

The Senate Select Committee on Presidential Campaign Activities takes no position on this Order.


Ronald D. Rotunda
Assistant Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 21 1973

RALPH NADER, et al.,)
Plaintiffs,)
v.)
EARL BUTZ, et al.,)
Defendants.)

JAMES F. DAVEY, Clerk

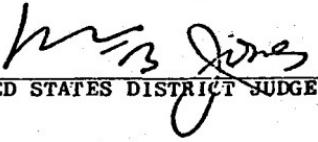
CIVIL ACTION NO. 148-72

PROTECTIVE ORDER

This matter having come before the Court at a hearing on December 19, 1973, and defendants having orally moved for a protective order which would prohibit the premature disclosure by counsel of material furnished under subpoena in this case but not yet publicly filed with the Court, and counsel for plaintiffs having indicated that plaintiffs offered no objection to said motion as limited, and the Court finding that good cause exists for the issuance of such an order, it is, therefore, this 21st day of December 1973 hereby

ORDERED

That counsel in this case are directed not to publicly disclose material submitted to them under subpoena unless and until such material is publicly filed with the Court in some appropriate manner or otherwise appropriately utilized in this judicial proceeding.


UNITED STATES DISTRICT JUDGE

1903

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, et al.,)
Plaintiffs,)
v.) Civil Action No. 148-72
EARL BUTZ, et al.,)
Defendants.)

MOTION FOR CLARIFICATION OF PROTECTIVE
ORDER OR IN THE ALTERNATIVE FOR MODIFICATION THEREOF

1. On December 21, 1973, without opposition, this Court entered a protective order directing counsel "not to publicly disclose material submitted to them under subpoena."
2. On January 10, 1974, the undersigned counsel for plaintiffs was served with the attached subpoena duces tecum for documents covered by the protective order. The undersigned declined to comply, believing that he was prohibited from doing so by the protective order.
3. Plaintiffs move the Court for clarification of the protective order, to wit whether the prohibition against public disclosure prohibits counsel from complying with the subpoena, or in the alternative for modification of the protective order to permit counsel to comply with the subpoena.

Respectfully submitted,

WILLIAM A. DOBROVIR
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D.C. 20036

January 30, 1974

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that I have served a copy of the foregoing Motion, Points and Authorities and Order on Irwin Goldblom and David Dorsen by first class mail, this 30th day of January, 1974.

William A. Dobrovir

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, et al.,)
Plaintiffs,)
v.) Civil Action No. 148-72
EARL BUTZ, et al.,)
Defendants.)

POINTS AND AUTHORITIES

This Court's order of December 21, 1973.

Respectfully submitted,

WILLIAM A. DOBROVIR
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D.C. 20036

January 30, 1974

Attorneys for Plaintiffs

1905

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, et al.,)
Plaintiffs,)
v.) Civil Action No. 148-72
EARL BUTZ, et al.,)
Defendants.)

ORDER

This Court's protective order of December 21, 1973, is
hereby clarified as follows:

Date

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 12 1974

RALPH NADER, et al.,)
Plaintiffs,)
v.) Civil Action No. 148-72
EARL BUTZ, et al.,)
Defendants.)

OPPOSITION TO PLAINTIFFS' MOTION FOR
CLARIFICATION OF PROTECTIVE ORDER OR
IN THE ALTERNATIVE FOR MODIFICATION THEREOF

The White House Custodian of Records, by his undersigned attorneys, hereby opposes the Motion of Plaintiffs for Clarification or, Alternatively, for Modification of the Protective Order entered by this Court on December 21, 1973. The grounds for this opposition are that production of the documents in question to the Senate Select Committee would be contrary to the purposes for which the Protective Order was issued, that compliance with the subpoena would be at odds with this Court's judgment in Senate Select Committee on Presidential Campaign Activities v. Nixon, U.S.D.C. D.C., C.A. No. 1583-73, February 8, 1973, and that the Committee should be required to proceed against the real party in interest, and not counsel in this case who hold the documents in a confidential capacity. In support of this opposition the Court is respectfully referred to a letter to the Chairman of the Senate Committee from Irving Jaffe, Acting Assistant Attorney General, Civil Division, Department of Justice, dated

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January 21, 1974, attached as Exhibit A hereto, and to the
Points and Authorities filed herewith.

Respectfully submitted,

Irving Jaffe
IRVING JAFFE
Acting Assistant Attorney General

Irwin Goldloom
IRWIN GOLDLOOM

David J. Anderson
DAVID J. ANDERSON

Attorneys, Department of Justice
Attorneys for White House
Custodian of Records

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Department of Justice.

Washington 20530

FILED

January 21, 1974

FEB 12 1974

JAMES F. DAVEY, CSM

Honorable Sam J. Ervin, Jr.
Chairman, Senate Select Committee on
Presidential Campaign Activities
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to the two subpoenas issued by you as Chairman of the Senate Select Committee on Presidential Campaign Activities and received by me and by Irwin Goldblom, Acting Deputy Assistant Attorney General, on January 10, 1974.

We have also received a copy of a letter to the Honorable William Jones, U.S. District Judge, from David Dorsey, Assistant Chief Counsel for the above Committee in connection with the issuance of these subpoenas.

As you may know, the Department of Justice has possession of the documents listed in the attachment to the subpoenas by virtue of our representation as counsel for the Custodian of Records of the White House in connection with subpoenas issued in the case of Nader, et al. v. Butz, et al., 171-72, U.S.D.C., over which Judge Jones is presiding.

Certain other documents involved in that litigation are the subject of a subpoena issued by your Committee to President Nixon. President Nixon declined to produce such documents in his letter to you on January 4, 1974.

EXHIBIT A

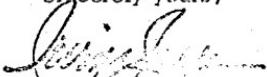
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On December 21, 1973, the district court in the above litigation issued a protective order prohibiting the disclosure by all counsel, except for purposes of the litigation, of evidence obtained under subpoena and through the discovery process. The government sought that protective order so as to protect against extra-judicial use of the material obtained by discovery proceedings in the litigation and to insure that the issues in the case be judicially resolved without the impact of extra-judicial use of evidence.

For the foregoing reasons and upon the authority of the Attorney General, as set forth in 28 C.F.R., §16.24, we must respectfully decline to comply with the subpoena in order to protect the interests of the government in the litigation in which we are participating. We are confident that the issues encompassed in such litigation will, in this manner, receive a fair judicial resolution.

Sincerely yours,


Irving Jaffe

Acting Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 12 1974

RALPH NADER, et al.,)
Plaintiffs,)
v.) Civil Action No. 148-72
EARL BUTZ, et al.,)
Defendants.)

J. G. DAWYER, Clerk

POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLARIFICATION
OF PROTECTIVE ORDER OR IN THE
ALTERNATIVE FOR MODIFICATION THEREOF.

Statement

On December 21, 1973, this Court entered a Protective Order in this case, directing counsel not to publicly disclose material obtained under subpoena unless and until that material is filed with the Court or otherwise appropriately utilized in this judicial proceeding. The Senate Watergate Committee, apparently stymied in its attempts to obtain material directly from the White House, has now served subpoenas on counsel for both sides in this action, demanding certain documents surrendered by the White House Custodian of Records under subpoena of this Court.^{1/} Plaintiffs' now seek clarification or modification of the Protective Order to allow their counsel to comply with the Senate Committee subpoena. The Custodian opposes that motion because it would frustrate the purposes for which the Protective

1/ Government counsel declined to produce the material by letter to the Committee from Acting Assistant Attorney General Jaffe, dated January 21, 1974, a copy of which is attached to the opposition as Exhibit A.

Order was originally issued, because the Senate Committee is attempting to collaterally attack the judgment of another Judge of this Court that such subpoenas should not be enforced in the present context and finally because counsel held the documents in question in a fiduciary capacity and the Committee should be required to seek such documents against the parties from whom they emanated.

Argument

1. The Protective Order issued by the Court in this case was sought by the government so as to protect against extra-judicial use of the material obtained by discovery proceedings in this litigation and to insure that the issues in this case be judicially resolved without the impact of extra-judicial use of evidence. While admittedly there is little parallel between the events leading to issuance of the Protective Order and the uses to which the material might be put by the Senate Committee, nevertheless the purpose of insuring a fair judicial resolution without extra-judicial use of evidence may well be compromised if these subpoenas were deemed to take precedence over these proceedings, and the Committee were enabled to publicly disclose these documents. Cf., Senate Select Committee on Presidential Campaign Activities v. Nixon, U.S.D.C. D.C., C.A. No. 1593-73, February 8, 1973.

2. Moreover, the issue of precedence would seem to be resolved adversely to the Committee by Judge Gesell's opinion in Senate Select Committee, supra, where this Court held that fair resolution of pending criminal prosecution required that

the Committee's subpoenas not be enforced. The same general considerations would apply to this civil litigation and, in fact, principles of collateral estoppel would appear to foreclose the Committee from arguing to the contrary. See generally Commissioner v. Sunnen, 333 U.S. 591, 597-599 (1948).

3. Finally, the documents in question do not belong to counsel for either side. They were surrendered by the White House Custodian of Records under subpoena of this Court for use in this proceeding. Attorneys holding documents in such a capacity should not be subject to claims by a third party against one of the principals. The Committee, which has statutory authority to seek judicial enforcement of its subpoenas, see generally Senate Select Committee, supra, should be required to proceed against the real party in interest and not counsel who are acting in this instance as officers of the Court.²

Conclusion

For the above reasons, Plaintiffs' Motion to Clarify or Modify this Court's Protective Order should be denied.

Respectfully submitted,

Irving Jaffe
IRVING JAFFE
Acting Assistant Attorney General

Irwin Goldblum
IRWIN GOLDBLOOM

David J. Anderson
DAVID J. ANDERSON

Attorneys, Department of Justice
Attorneys for White House
Custodian of Records

2/ Indeed, in any judicial proceeding to enforce the Committee subpoenas against counsel, there would apparently be no case or controversy. Plaintiffs' present Motion demonstrates that there is no real adversity between them and the Committee. The real party in interest is the President who is not a party here and who has declined to turn over the documents in question.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 148-72
)
EARL IUTZ, et al.,)
)
Defendants.)

ORDER

This matter having come before the Court on Plaintiffs' Motion for Clarification of Protective Order or in the Alternative for Modification Thereof, and the opposition of the White House Custodian of Records thereto; and the Court having considered that motion and opposition and all relevant pleadings; and the Court having concluded that plaintiffs' motion is not well taken; it is therefore this _____ day of February, 1974 hereby

ORDERED

That Plaintiffs' Motion for Clarification of Protective Order or in the Alternative for Modification Thereof be and is hereby denied.

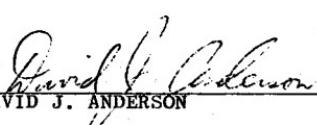
UNITED STATES DISTRICT JUDGE

1914

CERTIFICATE OF SERVICE

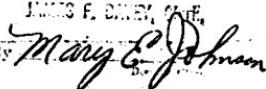
I hereby certify that I have served the foregoing
Opposition to Plaintiffs' Motion for Clarification of
Protective Order or in the Alternative for Modification
thereof, along with the supporting Points and Authorities
and proposed Order upon plaintiffs by mailing a copy,
postage prepaid, this 12th day of February, 1974, to their
counsel,

William A. Dobrovir, Esq.
2005 L Street, N.W.
Washington, D.C. 20036


DAVID J. ANDERSON

A TRUE COPY

JAMES F. DINEY, M.P.

By 

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ralph Nader, et al.,)
Plaintiffs)
v.) Civil Action No. 148-72
Earl Butz, et al.,)
Defendants)

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

1. On January 30, 1974, counsel for plaintiffs filed a motion for clarification of the protective order issued by this Court on December 21, 1973.
 2. The Senate Select Committee on Presidential Campaign Activities respectfully moves for leave to file the accompanying brief amicus curiae for purposes of plaintiffs' motion only. Both plaintiffs and defendants have consented to the filing of the Committee's brief. In the event the Court schedules oral argument on plaintiffs' motion, the movant respectfully requests to be heard.

Accordingly, for the reasons stated in the accompanying memorandum, the Committee respectfully requests that this motion to file a brief amicus curiae be granted.

Respectfully submitted,

J. Land h. Dorsen

Samuel Dash
Chief Counsel

Fred Thompson
Minority Counsel

David M. Dorsen
Assistant Chief Counsel

**James Hamilton
Assistant Chief Counsel**

Alan S. Weitz
Assistant Counsel

W. Dennis Summers
Assistant Counsel

United States Senate
Washington, D.C. 20510
Telephone Number 225-0531
Attorneys for Movant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ralph Nader, et al.,)
)
)
Plaintiffs)
)
v.)
)
Earl Butz, et al.,)
)
Defendants)
)
)

Civil Action No. 148-72

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR LEAVE
TO FILE BRIEF AMICUS CURIAE

1. The Senate Select Committee on Presidential Campaign Activities (the movant) is a duly authorized and constituted committee of the Senate of the United States. It was created by Senate Resolution 60, 93d Congress, 1st Session (1973), which was enacted by a unanimous vote of the Senate on February 7, 1973. (A copy of S. Res. 60 is attached hereto as Exhibit B.)

2. The movant has issued subpoenas duces tecum to counsel in this case, seeking documents relevant to its investigation of the Administration's 1971 milk price support decision. Both counsel for plaintiffs and counsel for defendants have declined to comply with the Committee's subpoenas on the ground that this Court's protective order of December 21, 1973 precludes them from doing so. On January 30, 1974, counsel for plaintiffs filed in this Court a motion for modification or clarification of the protective order to permit counsel to comply with the Committee's subpoenas.

3. The Committee's interest in obtaining the subpoenaed materials is one of the principal matters at issue in connection with plaintiffs' motion. The Committee, therefore, is vitally interested in the disposition of plaintiffs' motion for clarification or modification of the protective order. Furthermore, the Committee, as a legislative and investigative body,

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believes that it is in a unique position to bring to the Court's attention certain compelling reasons for permitting counsel to comply with the subpoenas. In conclusion, the movant believes that, if its motion for leave to file is granted, it can clarify the issues raised by plaintiffs' motion.

Accordingly, the Committee's motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted,

Samuel Dash

Samuel Dash
Chief Counsel

Fred Thompson
Minority Counsel

David M. Dorsen
Assistant Chief Counsel

James Hamilton
Assistant Chief Counsel

Alan S. Weitz
Assistant Counsel

W. Dennis Summers
Assistant Counsel

United States Senate
Washington, D.C. 20510
Telephone Number 225-0531
Attorneys for Movant

1918

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ralph Nader, et al.,)
Plaintiffs)
v.)
Earl Butz, et al.,) Civil Action No. 148-72
Defendants)

ORDER

This matter having come before the Court on the Committee's Motion for Leave to File Brief Amicus Curiae, and the Court being of the opinion that said motion should be granted, it is hereby this ____ day of February, 1974,

ORDERED, that the Committee's Motion for Leave to File Brief Amicus Curiae is granted.

William B. Jones
United States District Judge
United States District Court
for the District of Columbia

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ralph Nader, et al.,)
Plaintiffs)
v.) Civil Action No. 148-72
Earl Butz, et al.,)
Defendants)
)

BRIEF OF AMICUS CURIAE IN SUPPORT
OF PLAINTIFFS' MOTION FOR CLARIFICATION
OR MODIFICATION OF PROTECTIVE ORDER.

On January 10, 1974, the Senate Select Committee on Presidential Campaign Activities served upon William Dobrovir, counsel for plaintiffs in this action, and Irving Jaffe and Irwin Goldbloom, counsel for defendants,*/ subpenas duces tecum (copies of which are attached as Exhibits A-1, A-2, and A-3). Counsel declined to comply with the Committee's subpenas on the ground that this Court's protective order of December 21, 1973 precluded them from doing so. On January 30, 1974, counsel for plaintiffs filed in this Court a "Motion for Clarification of Protective Order or in the Alternative for Modification Thereof" to permit compliance. The Select Committee submits this brief in support of plaintiffs' motion. The Committee's position is that the protective order should be clarified, or in the alternative, modified, to permit counsel to comply with its subpenas.

BACKGROUND

The Senate Select Committee on Presidential Campaign Activities is a duly authorized and constituted committee of

*/Messrs. Jaffe and Goldbloom are also serving as counsel to the White House Custodian of Records in this action.

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the Senate of the United States. It was created by Senate Resolution 60, 93d Congress, 1st Session (1973) (S. Res. 60), which was enacted by a unanimous vote of the Senate on February 7, 1973. (a copy of S. Res. 60 is attached hereto as Exhibit B).

Under S. Res. 60 the Select Committee is empowered to investigate and study "illegal, improper, and unethical activities" in connection with the Presidential campaign and election of 1972 and to determine the necessity of new legislation "to safeguard the electoral process by which the President of the United States is chosen." The Select Committee is further empowered, by Section 3 (a) (5) of S. Res. 60, to subpoena any department, agency, or employee of the executive branch of the United States Government, or any private person, for production of documents and materials in his custody or control. Pursuant to S. Res. 60, the Select Committee is investigating the relationship, if any, between the March, 1971, decision by the President to increase the milk price support level and the promise of contributions by dairy cooperatives to President Nixon's 1972 campaign.

On April 10, 1973, plaintiffs subpoenaed from the White House Custodian of Records all materials in his possession relating to, inter alia, the Administration's milk price support decision and political contributions from the dairy lobby. In response to this request, J. Fred Buzhardt, Special Counsel to the President, issued several interim lists of documents in the possession of the Custodian relating to the decision and to dairy contributions.

On December 5, 1973, Mr. Buzhardt filed a final list, dividing into two categories all documents in the possession of the Custodian and covered by plaintiffs' subpoena: Category I of the documents described consists of those items as to which no claim of executive privilege was asserted and copies of which were turned over to plaintiffs' counsel. Category II consists of documents as to which executive privilege was

claimed and copies of which were turned over to this Court for in camera inspection for the purpose of determining the applicability of this privilege. Mr. Buzhardt later discovered a tape recording of the meeting between President Nixon and dairy industry leaders on March 23, 1971. This recording, which falls within Category I, was also turned over to counsel for plaintiffs.*/

Beginning in October, 1973, the Select Committee made a number of written and oral requests, both to Mr. Buzhardt and to counsel for the defendants, for these materials, copies of which are in their possession. All of these requests were either refused or unanswered. Prior to December 21, 1973, no specific reason for these refusals was proffered. After issuance of the Court's protective order on that date, counsel for the defendants cited that order as a reason for their refusal when they were asked for copies of the documents.

The Committee must complete its investigation, and then report its findings and legislative recommendations to the full Senate --- all in a matter of the next several weeks or months.**/ In view of this obligation and in view of the rejections of its requests for materials, the Committee, on January 10, 1974, served upon William Dobrovir, counsel for plaintiffs, and Irving Jaffe and Irwin Goldbloom, counsel for defendants, the attached subpoenas duces tecum (Exhibits A-1, A-2, and A-3) for Category I documents only.***/ In his letter of January 21, 1974 (attached hereto as Exhibit C), counsel for defendants declined to comply with the Committee's subpoenas on the ground that this Court's protective order of December 21, 1973,

*/In addition, counsel for the defendants have publicly filed, as Exhibit C to a pleading dated January 13, 1974, an additional document relating to "milk money" and presumably also falling within Category I. However, we can find no record of the Custodian specifically informing the Court or plaintiffs' counsel of the existence of this document.

**/Under S. Res. 60, the Committee is required to report to the Senate no later than February 28, 1974. The Committee has voted to seek an extension until May 28, 1974.

***/The Committee on December 18, 1973, served a separate subpoena duces tecum on the President, through his counsel, requesting the production of Category II and certain other documents. The Committee's subpoenas for Category I and Category II documents, in their specific terms, do not overlap. Therefore, no question of executive privilege can be raised in connection with plaintiffs' motion.

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precluded them from doing so. Similarly, counsel for plaintiffs declined to comply with the Committee's subpoena and filed a motion requesting the Court to clarify or amend the order to permit counsel to comply.

As we discuss below, there is no dispute as to the validity of the Committee's subpoenas and of counsel's obligation, absent any applicable court order, to comply fully. In view of the Committee's need for the subpoenaed items and of the circumstances leading to the entry of the protective order, this Court should grant plaintiffs' motion and clarify or amend its order to permit such compliance.

ARGUMENT

I. THE VALIDITY AND SCOPE OF THE COMMITTEE'S SUBPENAS IS UNDISPUTED AND COUNSEL HAVE AN OBLIGATION, ABSENT THE COURT ORDER, TO COMPLY FULLY.

The validity and enforceability of the Committee's subpoenas, in all respects, including the Committee's authority, the relevancy of the subpoenaed materials and the scope of the subpoenas, is unassailable. Since no claim of executive or any other privilege can be asserted to withhold the documents, counsel have an obligation, absent any applicable court order, to comply with the subpoenas.

a. Authority, Relevancy and Scope: There is no dispute that the Committee's subpoenas duces tecum, addressed to and served on counsel on January 10, 1974, were issued pursuant to the Committee's authority. Nor can it be disputed that the subpoenaed items are relevant to the Committee's investigation of the President's March 25, 1971, decision to increase milk price supports and to dairy contributions. Indeed, the Custodian, himself, has admitted that these materials are relevant to such matters.^{*/} Furthermore, no tenable

^{*}/The relevance of the subpoenaed documents to the Committee's inquiry is illustrated by the three memoranda attached to the "Memorandum of White House Custodian of Records in Support of Claim of Executive Privilege" filed in this Court on January 18, 1974. These memoranda contain references to "milk money," the "milk project" and the "commitment" from dairy cooperatives to President Nixon's 1972 campaign. The nature of this commitment and the possibility that it influenced the President's milk price support decision are issues central to the Committee's investigation. These memoranda, which counsel for the defendants have themselves stated are a "representative sampling" of the Category I materials, underscore the relevance of the subpoenaed materials to the Committee's investigation.

argument can be made that the Committee's subpoenas are either overly broad or burdensome. The Committee's subpoenas seek only the 30 enumerated items identified by the Custodian and produced in response to plaintiffs' subpoena.

b. Privilege: No issue of executive privilege can be raised by plaintiffs' motion. It is obvious from a glance at the Custodian's "representative sampling"^{*/} of Category I materials--which relate to "milk money" and other political matters--that they are far beyond any arguable purview of executive privilege. But the Court need not address itself, with respect to plaintiffs' motion, to such matters, for the counsel for the defendants, on behalf of the Custodian, have flatly declared:

These Category I documents, as opposed to the ones on which privilege was claimed, were not part of any deliberative process relating to governmental decision making.^{**}

Absent any applicable court order, then, counsel are under a legal obligation to comply with the Committee's subpoenas and produce these Category I materials, in their possession.^{***}

II. THE COURT'S PROTECTIVE ORDER SHOULD BE CLARIFIED OR MODIFIED TO PERMIT COMPLIANCE WITH THE COMMITTEE'S SUBPOENAS

a. Interpretation of the Protective Order: The Committee believes that the protective order should be interpreted to permit compliance with subpoenas issued by a duly authorized Committee of the Congress in furtherance of its investigation. This interpretation is supported by the language of the order itself. The requirement that counsel not "publicly disclose materials submitted to them under subpoena" does not appear to apply to

^{*/}See Memorandum of White House Custodian of Records in support of Claim of Executive Privilege, supra at 2.

^{**}/Id.

^{***}/Counsel have informed the Committee that the subpoenaed materials are in fact in their possession.

the production of materials to the Select Committee for use in the course of its investigation. In this regard, it should be noted that the Committee's rules provide that materials submitted to it under subpoena are to be used only in the orderly course of its legislative and investigative activities and that the materials be included in the public record only by formal action of the Committee.

The events leading to issuance of the Court's protective order indicated that the order was requested because of unique circumstances involving public disclosure of subpoenaed materials by counsel for plaintiffs. Presumably, the order was entered to prevent any further disclosure of the kind which occurred in December, 1973, and not to prevent compliance with a subpoena of a coordinate branch of Government.

b. The Committee's Need for Timely Production and the Absence of Countervailing Considerations: If the

Court interprets its order, in its present form, to preclude the production of documents in response to the Committee's subpoena, the Committee respectfully urges the Court to modify the order to permit compliance.

As noted above, there is no applicable privilege, executive or otherwise, to preclude production of the subpoenaed materials. Furthermore, in view of recent events since the entry of the Court's order, any other considerations in favor of non-disclosure must be given considerably less weight now than at the time the order was entered. In the past several weeks, seven of the 30 documents have been placed in the public file of the Court by counsel for the parties and by the White House Custodian of Records.

The Committee does not criticize the process of piecemeal public disclosure.*/ Nonetheless, even if it is assumed that

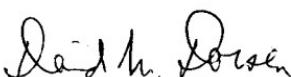
*/The December 21, 1973 protective order permits counsel to publicly disclose material in this way: "... counsel in this case are directed not to publicly disclose material submitted to them under subpoena unless and until such material is publicly filed with the Court in some appropriate manner or otherwise appropriately utilized in this judicial proceeding."

most or all of the documents eventually will be made public in the course of this action, the Committee, because of the time limitations discussed above, will be precluded by the protective order of this Court from having the benefit of these highly significant and relevant materials. The Committee's need, and right, to these materials is therefore heightened by these time limitations. In view of the Committee's need and the absence of any countervailing considerations, it is inappropriate for the Court, for all practical purposes, to require the parties to withhold from a coordinate branch of the Government highly relevant information on a matter of substantial public importance. Neither privilege nor propriety provides a basis for such a ruling.

CONCLUSION

Accordingly, the Committee supports plaintiffs' motion and respectfully urges the Court to issue an order clarifying or, in the alternative, modifying the December 21, 1973 protective order to permit counsel to comply fully with the Committee's subpoenas.

Respectfully submitted,



Samuel Dash
Chief Counsel

Fred D. Thompson
Minority Counsel

David M. Dorsen
Assistant Chief Counsel

James Hamilton
Assistant Chief Counsel

Alan S. Weitz
Assistant Counsel

W. Dennis Summers
Assistant Counsel

United States Senate
Washington, D.C. 20510
Telephone Number 225-0531
Attorneys for Movant

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UNITED STATES OF AMERICA
Congress of the United States

To William A. Dobrovir, Washington, D. C.

, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on January 14, 1974, at 10 o'clock a.m., at their committee room 1418 Dirksen Senate Office Building, Washington, D. C. then and there to testify what you may know relative to the subject matters under consideration by said committee.

And bring with you all documents listed on the attached sheet which are in your possession, custody, or control. It is not necessary for you to appear personally to testify in response to this subpoena.

If you fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To _____
to serve and return.

Given under my hand, by order of the committee, this
10th day of January, in the year of our
Lord one thousand nine hundred and seventy-four

Sam J. Ervin, Jr.

Chairman, Senate Select Committee on Presidential
Campaign Activities.

EXHIBIT A-1

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ATTACHMENT A

The documents and tape recording, listed below, which were produced by the defendants or the White House Custodian of Records to the plaintiffs in connection with the case of Nader v. Butz, civil action number 148-72, pending before the United States District Court for the District of Columbia:

1. A memorandum dated February 1, 1972 from a presidential assistant to another presidential assistant, part of which relates to political contributions and the subject lawsuit.
2. A list of pre-April 7, 1972 campaign contributions to the Committee to Reelect the President.
3. Card file records which would indicate any meeting or telephone conversation between the President and any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, if such individuals had a meeting or conversation "with the President during the period designated in the
4. A copy of a letter dated March 8, 1971 from MacGregor to Congressman Aspin to which is attached a copy of a letter dated March 5, 1971 from Congressman Aspin to Mr. MacGregor.

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5. A letter dated March 10, 1971 from Marion Edwyn Harrison to Charles W. Colson.
6. A letter dated March 11, 1971 from Marion Edwyn Harrison to Charles W. Colson to which is attached a routing slip from one presidential assistant to another.
7. A copy of a letter dated March 11, 1971 from Clark MacGregor to Congressman Griffin to which is attached a copy of a telegram from Congressman Griffin to Mr. MacGregor.
8. The relevant portion of a memorandum dated January 18, 1972 from Gordon Strachan to H. R. Haldeman.
9. The relevant portion of a memorandum from Gordon Strachan to H. R. Haldeman dated February 16, 1972.
10. Portions of Appointment Log of John Ehrlichman which indicate meetings with any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, during the period designated in the notice.
11. Portions of logs of H. R. Haldeman which indicate meetings or phone conversations with any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, during the period designated in the notice.

12. A memorandum from an official of the Council on International Economic Policy to an Assistant Director, OMB, dated February 1, 1973, and a reply memorandum from an Assistant Director, OMB, to an official of the Council on International Economic Policy dated February 9, 1973.
13. A memorandum between personnel within the Office of Management and Budget dated January 2, 1973.
14. Portions of a memorandum dated June 3, 1971 with two attachments dated May 27, 1971 concerning dairy import investigations under the Agricultural Adjustment Act of 1933.
15. A memorandum from the Administrative Assistant to the Secretary of Agriculture to a presidential assistant dated March 19, 1971, to which is attached a letter to the Secretary of Agriculture from Marion Edwyn Harrison, Esquire, dated March 11, 1971.
16. An undated page from a memorandum between White House officials which, among other things, has reference to the dairy price support program.
17. A memorandum from the Under Secretary of Agriculture to a presidential assistant dated March 31, 1971, to which is attached a copy of a speech delivered by the Under Secretary of Agriculture on April 1, 1971.

18. An undated and unsigned memorandum concerning the 1971 dairy price support program to which is attached a transcript of the television program "Issues and Answers" dated October 29, 1972.
19. Memorandum for H. R. Haldeman from Gordon Strachan dated September 28, 1971, to which are attached copies of newspaper articles described therein.
20. Memorandum for H. R. Haldeman from Charles Colson dated September 24, 1971, to which are attached a White House routing slip and a copy of a report of a judicial opinion.
21. Routing memorandum to H. R. Haldeman from Gordon Strachan dated November 3, 1971, to which are attached the titles and relevant pages of a talking paper for the Attorney General.
22. Memorandum for H. R. Haldeman from Gordon Strachan dated May 21, 1971, to which are attached seven pages of handwritten notes.
23. Routing memorandum to Gordon Strachan from Chuck Colson dated March 17, 1971, to which are attached (a) memorandum for Larry Higby dated February 2, 1971, (b) a sheet of paper stating "CWC wants the return of this file", (c) memorandum for H. R. Haldeman from Charles W. Colson dated February 8, 1971, (d) memorandum for Chuck Colson from H. R. Haldeman dated February 2, 1971, and (e) memorandum for H. R. Haldeman from Charles Colson dated February 1, 1971.

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24. Memorandum for H. R. Haldeman from Gordon Strachan dated September 24, 1971.
25. Memorandum for H. R. Haldeman from Gordon Strachan dated September 16, 1971.
26. Copy of picture with mailing label addressed to Mr. David Parr.
27. Page of news briefing with several titles identified in left margin, including FARM.
28. Letter to Mr. Charles W. Colson from David L. Parr dated September 10, 1970 with attached speech.
29. Page from Hoard's Dairyman dated December 10, 1970.
30. Tape recording, and any summary or copy thereof, of a meeting between the President and dairy industry leaders on March 23, 1971.

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UNITED STATES OF AMERICA
Congress of the United States

To Irving Jaffe, Acting Assistant Attorney General,
Department of Justice, Civil Division, Washington, D. C.

, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on January 14, 1974, at 10 o'clock a. m., at their committee room 1418 Dirksen Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

And bring with you all documents listed on the attached sheet which are in your custody, possession, or control. It is not necessary for you to appear personally to testify in response to this subpoena.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To _____
to serve and return.

Given under my hand, by order of the committee, this
10 day of January, in the year of our
Lord one thousand nine hundred and seventy-four


Sam J. Ervin, Jr.
Chairman, Senate Select Committee on Presidential
Campaign Activities.

EXHIBIT A-2

ATTACHMENT A

The documents and tape recording, listed below, which were produced by the defendants or the White House Custodian of Records to the plaintiffs in connection with the case of Nader v. Butz, civil action number 148-72, pending before the United States District Court for the District of Columbia:

1. A memorandum dated February 1, 1972 from a presidential assistant to another presidential assistant, part of which relates to political contributions and the subject lawsuit.
2. A list of pre-April 7, 1972 campaign contributions to the Committee to Reelect the President.
3. Card file records which would indicate any meeting or telephone conversation between the President and any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, if such individuals had a meeting or conversation with the President during the period designated in the notice.
4. A copy of a letter dated March 8, 1971 from Clark MacGregor to Congressman Aspin to which is attached a copy of a letter dated March 5, 1971 from Congressman Aspin to Mr. MacGregor.

5. A letter dated March 10, 1971 from Marion Edwyn Harrison to Charles W. Colson.

6. A letter dated March 11, 1971 from Marion Edwyn Harrison to Charles W. Colson to which is attached a routing slip from one presidential assistant to another.

7. A copy of a letter dated March 11, 1971 from Clark MacGregor to Congressman Griffin to which is attached a copy of a telegram from Congressman Griffin to Mr. MacGregor.

8. The relevant portion of a memorandum dated January 18, 1972 from Gordon Strachan to H. R. Haldeman.

9. The relevant portion of a memorandum from Gordon Strachan to H. R. Haldeman dated February 16, 1972.

10. Portions of Appointment Log of John Ehrlichman which indicate meetings with any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, during the period designated in the notice.

11. Portions of logs of H. R. Haldeman which indicate meetings or phone conversations with any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, during the period designated in the notice.

- 12.. A memorandum from an official of the Council on International Economic Policy to an Assistant Director, OMB, dated February 1, 1973, and a reply memorandum from an Assistant Director, OMB, to an official of the Council on International Economic Policy dated February 9, 1973.
- 13.. A memorandum between personnel within the Office of Management and Budget dated January 2, 1973.
- 14.. Portions of a memorandum dated June 3, 1971 with two attachments dated May 27, 1971 concerning dairy import investigations under the Agricultural Adjustment Act of 1933.
- 15.. A memorandum from the Administrative Assistant to the Secretary of Agriculture to a presidential assistant dated March 19, 1971, to which is attached a letter to the Secretary of Agriculture from Marion Edwyn Harrison, Esquire, dated March 11, 1971.
- 16.. An undated page from a memorandum between White House officials which, among other things, has reference to the dairy price support program.
- 17.. A memorandum from the Under Secretary of Agriculture to a presidential assistant dated March 31, 1971, to which is attached a copy of a speech delivered by the Under Secretary of Agriculture on April 1, 1971.

18. An undated and unsigned memorandum concerning the 1971 dairy price support program to which is attached a transcript of the television program "Issues and Answers" dated October 29, 1972.
19. Memorandum for H. R. Haldeman from Gordon Strachan dated September 28, 1971, to which are attached copies of newspaper articles described therein.
20. Memorandum for H. R. Haldeman from Charles Colson dated September 24, 1971, to which are attached a White House routing slip and a copy of a report of a judicial opinion.
21. Routing memorandum to H. R. Haldeman from Gordon Strachan dated November 3, 1971, to which are attached the titles and relevant pages of a talking paper for the Attorney General.
22. Memorandum for H. R. Haldeman from Gordon Strachan dated May 21, 1971, to which are attached seven pages of handwritten notes.
23. Routing memorandum to Gordon Strachan from Chuck Colson dated March 17, 1971, to which are attached (a) memorandum for Larry Higby dated February 2, 1971, (b) a sheet of paper stating "CWC wants the return of this file", (c) memorandum for H. R. Haldeman from Charles W. Colson dated February 8, 1971, (d) memorandum for Chuck Colson from H. R. Haldeman dated February 2, 1971, and (e) memorandum for H. R. Haldeman from Charles Colson dated February 1, 1971.

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24. Memorandum for H. R. Haldeman from Gordon Strachan dated September 24, 1971.
25. Memorandum for H. R. Haldeman from Gordon Strachan dated September 16, 1971.
26. Copy of picture with mailing label addressed to Mr. David Parr.
27. Page of news briefing with several titles identified in left margin, including FARM.
28. Letter to Mr. Charles W. Colson from David L. Parr dated September 10, 1970 with attached speech.
29. Page from Hoard's Dairyman dated December 10, 1970.
30. Tape recording, and any summary or copy thereof, of a meeting between the President and dairy industry leaders on March 23, 1971.

1938

UNITED STATES OF AMERICA
Congress of the United States

To Irwin Goldblum, Acting Assistant Deputy Attorney

General, Department of Justice, Washington, D. C.

, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on January 14, 1974, at 10 o'clock a.m., at their committee room 1418 Dirksen Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

And bring with you all documents listed on the attached sheet which are in your possession, custody, or control. It is not necessary for you to appear personally to testify in response to this subpoena.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To _____
to serve and return.

Given under my hand, by order of the committee, this 10 day of January, in the year of our Lord one thousand nine hundred and seventy-four

Sam J. Ervin, Jr.

Chairman, Senate Select Committee on Presidential Campaign Activities.

EXHIBIT A-3

1939

ATTACHMENT A

The documents and tape recording, listed below, which were produced by the defendants or the White House Custodian of Records to the plaintiffs in connection with the case of Nader v. Butz, civil action number 148-72, pending before the United States District Court for the District of Columbia:

1. A memorandum dated February 1, 1972 from a presidential assistant to another presidential assistant, part of which relates to political contributions and the subject lawsuit.
2. A list of pre-April 7, 1972 campaign contributions to the Committee to Reelect the President.
3. Card file records which would indicate any meeting or telephone conversation between the President and any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, if such individuals had a meeting or conversation with the President during the period designated in the notice.
4. A copy of a letter dated March 8, 1971 from Clark MacGregor to Congressman Aspin to which is attached a copy of a letter dated March 5, 1971 from Congressman Aspin to Mr. MacGregor.

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5. A letter dated March 10, 1971 from Marion Edwyn Harrison to Charles W. Colson.
6. A letter dated March 11, 1971 from Marion Edwyn Harrison to Charles W. Colson to which is attached a routing slip from one presidential assistant to another.
7. A copy of a letter dated March 11, 1971 from Clark MacGregor to Congressman Griffin to which is attached a copy of a telegram from Congressman Griffin to Mr. MacGregor.
8. The relevant portion of a memorandum dated January 18, 1972 from Gordon Strachan to H. R. Haldeman.
9. The relevant portion of a memorandum from Gordon Strachan to H. R. Haldeman dated February 16, 1972.
10. Portions of Appointment Log of John Ehrlichman which indicate meetings with any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, during the period designated in the notice.
11. Portions of logs of H. R. Haldeman which indicate meetings or phone conversations with any individuals on Schedule A, attached to the notice of deposition served upon the White House Custodian of Records, during the period designated in the notice.

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12. A memorandum from an official of the Council on International Economic Policy to an Assistant Director, OMB, dated February 1, 1973, and a reply memorandum from an Assistant Director, OMB, to an official of the Council on International Economic Policy dated February 9, 1973.
13. A memorandum between personnel within the Office of Management and Budget dated January 2, 1973.
14. Portions of a memorandum dated June 3, 1971 with two attachments dated May 27, 1971 concerning dairy import investigations under the Agricultural Adjustment Act of 1933.
15. A memorandum from the Administrative Assistant to the Secretary of Agriculture to a presidential assistant dated March 19, 1971, to which is attached a letter to the Secretary of Agriculture from Marion Edwyn Harrison, Esquire, dated March 11, 1971.
16. An undated page from a memorandum between White House officials which, among other things, has reference to the dairy price support program.
17. A memorandum from the Under Secretary of Agriculture to a presidential assistant dated March 31, 1971, to which is attached a copy of a speech delivered by the Under Secretary of Agriculture on April 1, 1971.

18. An undated and unsigned memorandum concerning the 1971 dairy price support program to which is attached a transcript of the television program "Issues and Answers" dated October 29, 1972.
19. Memorandum for H. R. Haldeman from Gordon Strachan dated September 28, 1971, to which are attached copies of newspaper articles described therein.
20. Memorandum for H. R. Haldeman from Charles Colson dated September 24, 1971, to which are attached a White House routing slip and a copy of a report of a judicial opinion.
21. Routing memorandum to H. R. Haldeman from Gordon Strachan dated November 3, 1971, to which are attached the titles and relevant pages of a talking paper for the Attorney General.
22. Memorandum for H. R. Haldeman from Gordon Strachan dated May 21, 1971, to which are attached seven pages of handwritten notes.
23. Routing memorandum to Gordon Strachan from Chuck Colson dated March 17, 1971, to which are attached (a) memorandum for Larry Higby dated February 2, 1971, (b) a sheet of paper stating "CWC wants the return of this file", (c) memorandum for H. R. Haldeman from Charles W. Colson dated February 8, 1971, (d) memorandum for Chuck Colson from H. R. Haldeman dated February 2, 1971, and (e) memorandum for H. R. Haldeman from Charles Colson dated February 1, 1971.

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24. Memorandum for H. R. Haldeman from Gordon Strachan dated September 24, 1971.
25. Memorandum for H. R. Haldeman from Gordon Strachan dated September 16, 1971.
26. Copy of picture with mailing label addressed to Mr. David Parr.
27. Page of news briefing with several titles identified in left margin, including FARM.
28. Letter to Mr. Charles W. Colson from David L. Parr dated September 10, 1970 with attached speech.
29. Page from Hoard's Dairyman dated December 10, 1970.
30. Tape recording, and any summary or copy thereof, of a meeting between the President and dairy industry leaders on March 23, 1971.

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93d CONGRESS
1st Session

S. RES. 60

IN THE SENATE OF THE UNITED STATES

FEBRUARY 5, 1973

Mr. ERVIN (for himself and Mr. MANSFIELD) submitted the following resolution; which was ordered to be placed on the calendar.

FEBRUARY 7, 1973

Considered, amended, and agreed to

[Omit the part struck through and insert the part printed in italic]

RESOLUTION

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

6.1. *Resolved*,

2. SECTION 1. (a) That there is hereby established a
3. select committee of the Senate, which may be called, for
4. convenience of expression, the Select Committee on Presi-
5. dential Campaign Activities, to conduct an investigation and
6. study of the extent, if any, to which illegal, improper, or
7. unethical activities were engaged in by any persons, acting

V

EXHIBIT "B"

1 either individually or in combination with others, in the
2 presidential election of 1972, or in any related campaign or
3 canvass conducted by or in behalf of any person seeking
4 nomination or election as the candidate of any political party
5 for the office of President of the United States in such elec-
6 tion, and to determine whether in its judgment any occur-
7 rences which may be revealed by the investigation and study
8 indicate the necessity or desirability of the enactment of new
9 congressional legislation to safeguard the electoral process
10 by which the President of the United States is chosen.

11 (b) The select committee created by this resolution shall
12 consist of ~~five~~ *seven* Members of the Senate, ~~three~~ *four* of
13 whom shall be appointed by the President of the Senate
14 from the majority Members of the Senate upon the recom-
15 mendation of the majority leader of the Senate, and ~~two~~
16 *three* of whom shall be appointed by the President of the
17 Senate from the minority Members of the Senate upon the
18 recommendation of the minority leader of the Senate. For
19 the purposes of paragraph 6 of rule XXV of the Standing
20 Rules of the Senate, service of a Senator as a member, chair-
21 man, or vice chairman of the select committee shall not be
22 taken into account.

23 (c) The select committee shall select a chairman and
24 vice chairman from among its members, and adopt rules of
25 procedure to govern its proceedings. The vice chairman shall
26 preside over meetings of the select committee during the

1 absence of the chairman, and discharge such other responsi-
2 bilities as may be assigned to him by the select committee or
3 the chairman. Vacancies in the membership of the select com-
4 mittee shall not affect the authority of the remaining mem-
5 bers to execute the functions of the select committee and
6 shall be filled in the same manner as original appointments
7 to it are made.

8 (d) A majority of the members of the select committee
9 shall constitute a quorum for the transaction of business, but
10 the select committee may fix a lesser number as a quorum
11 for the purpose of taking testimony or depositions.

12 SEC. 2. That the select committee is authorized and
13 directed to do everything necessary or appropriate to make
14 the investigation and study specified in section 1(a). With-
15 out abridging or limiting in any way the authority conferred
16 upon the select committee by the preceding sentence, the
17 Senate further expressly authorizes and directs the select
18 committee to make a complete investigation and study of the
19 activities of any and all persons or groups of persons or orga-
20 nizations of any kind which have any tendency to reveal the
21 full facts in respect to the following matters or questions:

22 (1) The breaking, entering, and bugging of the
23 headquarters or offices of the Democratic National Com-
24 mittee in the Watergate Building in Washington, District
25 of Columbia;

1 (2) The monitoring by bugging, eavesdropping,
2 wiretapping, or other surreptitious means of conversa-
3 tions or communications occurring in whole or in part in
4 the headquarters or offices of the Democratic National
5 Committee in the Watergate Building in Washington,
6 District of Columbia;

7 (3) Whether or not any printed or typed or written
8 document or paper or other material was surreptitiously
9 removed from the headquarters or offices of the Demo-
10 cratic National Committee in the Watergate Building in
11 Washington, District of Columbia, and thereafter copied
12 or reproduced by photography or any other means for
13 the information of any person or political committee or
14 organization;

15 (4) The preparing, transmitting, or receiving by
16 any person for himself or any political committee or
17 any organization of any report or information concern-
18 ing the activities mentioned in subdivision (1), (2),
19 or (3) of this section, and the information contained in
20 any such report;

21 (5) Whether any persons, acting individually or
22 in combination with others, planned the activities men-
23 tioned in subdivision (1), (2), (3), or (4) of this
24 section, or employed any of the participants in such
25 activities to participate in them, or made any payments

1 or promises of payments of money or other things of
2 value to the participants in such activities or their fam-
3 ilies for their activities, or for concealing the truth in
4 respect to them or any of the persons having any con-
5 nection with them or their activities, and, if so, the
6 source of the moneys used in such payments, and the
7 identities and motives of the persons planning such ac-
8 tivities or employing the participants in them;

9 (6) Whether any persons participating in any of
10 the activities mentioned in subdivision (1), (2), (3),
11 (4), or (5) of this section have been induced by bri-
12 bery, coercion, threats, or any other means whatsoever
13 to plead guilty to the charges preferred against them in
14 the District Court of the District of Columbia or to
15 conceal or fail to reveal any knowledge of any of the
16 activities mentioned in subdivision (1), (2), (3),
17 (4), or (5) of this section, and, if so, the identities
18 of the persons inducing them to do such things, and the
19 identities of any other persons or any committees or
20 organizations for whom they acted;

21 (7) Any efforts to disrupt, hinder, impede, or sabo-
22 tage in any way any campaign, canvass, or activity con-
23 ducted by or in behalf of any person seeking nomination
24 or election as the candidate of any political party for the
25 office of President of the United States in 1972 by in-

1 filtrating any political committee or organization or head-
2 quarters or offices or home or whereabouts of the person
3 seeking such nomination or election or of any person
4 aiding him in so doing, or by bugging or eavesdropping
5 or wiretapping the conversations, communications,
6 plans, headquarters, offices, home, or whereabouts of the
7 person seeking such nomination or election or of any
8 other person assisting him in so doing, or by exercising
9 surveillance over the person seeking such nomination or
10 election or of any person assisting him in so doing, or by
11 reporting to any other person or to any political com-
12 mittee or organization any information obtained by such
13 infiltration, eavesdropping, bugging, wiretapping, or
14 surveillance;

15 (8) Whether any person, acting individually or in
16 combination with others, or political committee or orga-
17 nization induced any of the activities mentioned in sub-
18 division (7) of this section or paid any of the partici-
19 pants in any such activities for their services, and, if so,
20 the identities of such persons, or committee, or organiza-
21 tion, and the source of the funds used by them to procure
22 or finance such activities;

23 (9) Any fabrication, dissemination, or publication
24 of any false charges or other false information having
25 the purpose of discrediting any person seeking nomina-

1 nomination or election as the candidate of any political party
2 to the office of President of the United States in 1972;

3 (10) The planning of any of the activities men-
4 tioned in subdivision (7), (8), or (9) of this section,
5 the employing of the participants in such activities,
6 and the source of any moneys or things of value which
7 may have been given or promised to the participants in
8 such activities for their services, and the identities of
9 any persons or committees or organizations which may
10 have been involved in any way in the planning, pro-
11 curing, and financing of such activities.

12 (11) Any transactions or circumstances relating to
13 the source, the control, the transmission, the transfer,
14 the deposit, the storage, the concealment, the expendi-
15 ture, or use in the United States or in any other coun-
16 try, of any moneys or other things of value collected or
17 received for actual or pretended use in the presidential
18 election of 1972 or in any related campaign or canvass
19 or activities preceding or accompanying such election
20 by any person, group of persons, committee, or orga-
21 nization of any kind acting or professing to act in behalf
22 of any national political party or in support of or in
23 opposition to any person seeking nomination or election
24 to the office of President of the United States in 1972;

- 1 (12) Compliance or noncompliance with any act
2 of Congress requiring the reporting of the receipt or dis-
3 bursement or use of any moneys or other things of value
4 mentioned in subdivision (11) of this section;
- 5 (13) Whether any of the moneys or things of value
6 mentioned in subdivision (11) of this section were
7 placed in any secret fund or place of storage for use in
8 financing any activity which was sought to be concealed
9 from the public, and, if so, what disbursement or expend-
10 iture was made of such secret fund, and the identities
11 of any person or group of persons or committee or org-
12 ganization having any control over such secret fund or
13 the disbursement or expenditure of the same;
- 14 (14) Whether any books, checks, canceled checks,
15 communications, correspondence, documents, papers,
16 physical evidence, records, recordings, tapes, or mate-
17 rials relating to any of the matters or questions the select
18 committee is authorized and directed to investigate and
19 study have been concealed, suppressed, or destroyed by
20 any persons acting individually or in combination with
21 others, and, if so, the identities and motives of any such
22 persons or groups of persons;
- 23 (15) Any other activities, circumstances, materials,
24 or transactions having a tendency to prove or disprove
25 that persons acting either individually or in combination

1. (1) whether others, engaged in any illegal, improper, or un-
2. (2) whether ethical activities in connection with the presidential
3. (3) in the election of 1972 or any campaign, canvass, or activity
4. (4) related to such election;

5. (5) whether (6) (16). Whether any of the existing laws of the
6. (6) United States are inadequate, either in their provisions
7. (7) or manner of enforcement to safeguard the integrity or
8. (8) purity of the process by which Presidents are chosen.

9. SEC. 3. (a) To enable the select committee to make
10. the investigation and study authorized and directed by this
11. resolution, the Senate hereby empowers the select committee
12. as an agency of the Senate (1) to employ and fix the com-
13. pensation of such clerical, investigatory, legal, technical, and
14. other assistants as it deems necessary or appropriate; (2) to
15. sit and act at any time or place during sessions, recesses, and
16. adjournment periods of the Senate; (3) to hold hearings for
17. taking testimony on oath or to receive documentary or physi-
18. cal evidence relating to the matters and questions it is author-
19. ized to investigate or study; (4) to require by subpena or
20. otherwise the attendance as witnesses of any persons who
21. the select committee believes have knowledge or information
22. concerning any of the matters or questions it is authorized to
23. investigate and study; (5) to require by subpena or order
24. any department, agency, officer, or employee of the execu-
25. tive branch of the United States Government, or any private

1 person, firm, or corporation, or any officer or former officer
2 or employee of any political committee or organization to
3 produce for its consideration or for use as evidence in its
4 investigation and study any books, checks, canceled checks,
5 correspondence, communications, document, papers, physical
6 evidence, records, recordings, tapes, or materials relating to
7 any of the matters or questions it is authorized to investigate
8 and study which they or any of them may have in their
9 custody or under their control; (6) to make to the Senate
10 any recommendations it deems appropriate in respect to the
11 willful failure or refusal of any person to appear before it in
12 obedience to a subpoena or order, or in respect to the willful
13 failure or refusal of any person to answer questions or give
14 testimony in his character as a witness during his appearance
15 before it, or in respect to the willful failure or refusal of any
16 officer or employee of the executive branch of the United
17 States Government or any person, firm, or corporation, or any
18 officer or former officer or employee of any political committee
19 or organization, to produce before the committee any books,
20 checks, canceled checks, correspondence, communications,
21 document, financial records, papers, physical evidence, rec-
22 ords, recordings, tapes, or materials in obedience to any sub-
23 pena or order; (7) to take depositions and other testimony on
24 oath anywhere within the United States or in any other
25 country; (8) to procure the temporary or intermittent serv-

1 ices of individual consultants, or organizations thereof, in the
2 same manner and under the same conditions as a standing
3 committee of the Senate may procure such services under
4 section 202(i) of the Legislative Reorganization Act of
5 1946; (9) to use on a reimbursable basis, with the prior
6 consent of the Government department or agency concerned
7 and the Committee on Rules and Administration, the serv-
8 ices of personnel of any such department or agency; (10) to
9 use on a reimbursable basis or otherwise with the prior con-
10 sent of the chairman of any other of the Senate committees
11 or the chairman of any subcommittee of any committee of
12 the Senate the facilities or services of any members of the
13 staffs of such other Senate committees or any subcommittees
14 of such other Senate committees whenever the select com-
15 mittee or its chairman deems that such action is necessary or
16 appropriate to enable the select committee to make the in-
17 vestigation and study authorized and directed by this resolu-
18 tion; (11) to have access through the agency of any mem-
19 bers of the select committee ~~or any of its investigatory or~~
20 ~~legal assistants designated by it or its chairman or the rank-~~
21 ~~ing minority member, chief majority counsel, minority coun-~~
22 ~~sel, or any of its investigatory assistants jointly designated by~~
23 ~~the chairman and the ranking minority member to any data,~~
24 evidence, information, report, analysis, or document or papers
25 relating to any of the matters or questions which it is author-

1 ized and directed to investigate and study in the custody or
2 under the control of any department, agency, officer, or em-
3 ployee of the executive branch of the United States Govern-
4 ment having the power under the laws of the United States
5 to investigate any alleged criminal activities or to prosecute
6 persons charged with crimes against the United States which
7 will aid the select committee to prepare for or conduct the
8 investigation and study authorized and directed by this reso-
9 lution; and (12) to expend to the extent it determines nec-
10 essary or appropriate any moneys made available to it by the
11 Senate to perform the duties and exercise the powers con-
12 ferred upon it by this resolution and to make the investigation
13 and study it is authorized by this resolution to make.

14 (b) Subpenas may be issued by the select committee
15 acting through the chairman or any other member design-
16 nated by him, and may be served by any person designated
17 by such chairman or other member anywhere within the
18 borders of the United States. The chairman of the select
19 committee, or any other member thereof, is hereby author-
20 ized to administer oaths to any witnesses appearing before
21 the committee.

22 (c) In preparing for or conducting the investigation and
23 study authorized and directed by this resolution, the select
24 committee shall be empowered to exercise the powers con-
25 ferred upon committees of the Senate by section 6002 of title

1 18 of the United States Code or any other Act of Congress
2 regulating the granting of immunity to witnesses.

3 SEC. 4. The select committee shall have authority to
4 recommend the enactment of any new congressional legis-
5 lation which its investigation considers it is necessary or
6 desirable to safeguard the electoral process by which the
7 President of the United States is chosen.

8 SEC. 5. The select committee shall make a final report of
9 the results of the investigation and study conducted by it
10 pursuant to this resolution, together with its findings and
11 its recommendations as to new congressional legislation it
12 deems necessary or desirable, to the Senate at the earliest
13 practicable date, but no later than February 28, 1974. The
14 select committee may also submit to the Senate such interim
15 reports as it considers appropriate. After submission of its
16 final report, the select committee shall have three calendar
17 months to close its affairs, and on the expiration of such
18 three calendar months shall cease to exist.

19 SEC. 6. The expenses of the select committee through
20 February 28, 1974, under this resolution shall not exceed
21 \$500,000, of which amount not to exceed \$25,000 shall be
22 available for the procurement of the services of individual
23 consultants or organizations thereof. Such expenses shall be
24 paid from the contingent fund of the Senate upon vouchers
25 approved by the chairman of the select committee.

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- 1 *The minority members of the select committee shall have one-*
- 2 *third of the professional staff of the select committee (includ-*
- 3 *ing a minority counsel) and such part of the clerical staff*
- 4 *as may be adequate.*

1958

93rd CONGRESS
1st SESSION

S. RES. 60

RESOLUTION

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

By Mr. ERVIN and Mr. MANSFIELD

FEBRUARY 5, 1973

Ordered to be placed on the calendar

FEBRUARY 7, 1973

Considered, amended, and agreed to

1959

Department of Justice
Washington 20530

January 21, 1974

Honorable Sam J. Ervin, Jr.
Chairman, Senate Select Committee on
Presidential Campaign Activities
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to the two subpoenas issued by you as Chairman of the Senate Select Committee on Presidential Campaign Activities and received by me and by Irwin Goldbloom, Acting Deputy Assistant Attorney General, on January 10, 1974.

We have also received a copy of a letter to the Honorable William Jones, U.S. District Judge, from David Dorsen, Assistant Chief Counsel for the above Committee in connection with the issuance of these subpoenas.

As you may know, the Department of Justice has possession of the documents listed in the attachment to the subpoenas by virtue of our representation as counsel for the Custodian of Records of the White House in connection with subpoenas issued in the case of Nader, et al. v. Butz, et al., 178-72, U.S.D.C., over which Judge Jones is presiding.

Certain other documents involved in that litigation are the subject of a subpoena issued by your Committee to President Nixon. President Nixon declined to produce such documents in his letter to you of January 4, 1974.

EXHIBIT C

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On December 21, 1973, the district court in the above litigation issued a protective order prohibiting the disclosure by all counsel, except for purposes of the litigation, of evidence obtained under subpoena and through the discovery process. The government sought that protective order so as to protect against extra-judicial use of the material obtained by discovery proceedings in the litigation and to insure that the issues in the case be judicially resolved without the impact of extra-judicial use of evidence.

For the foregoing reasons and upon the authority of the Attorney General, as set forth in 28 C.F.R., §16.24, we must respectfully decline to comply with the subpoena in order to protect the interests of the government in the litigation in which we are participating. We are confident that the issues encompassed in such litigation will, in this manner, receive a fair judicial resolution.

Sincerely yours,

Irving Jaffe

Acting Assistant Attorney General

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Certificate of Service

I, W. Dennis Summers, do hereby certify that on February 12, 1974, I served copies of the attached Motion for Leave to File Brief Amicus Curiae, Memorandum of Points and Authorities in Support of Motion For Leave to File Brief Amicus Curiae, Order and Brief Amicus Curiae upon plaintiffs and defendants by having said copies delivered by hand to the offices of William Dobrovir, counsel for plaintiffs, 2005 L Street, N.W., Washington, D.C. and Irving Jaffe and Irwin Goldbloom, counsel for defendants, Department of Justice, Washington, D.C.

W. Dennis Summers
W. Dennis Summers

1962

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, et al., }
Plaintiffs, }
v. } Civil Action No. 148-72
EARL BUTZ, et al., }
Defendants. }

SUPPLEMENTAL MEMORANDUM OF AMICUS CURIAE

The Senate Select Committee on Presidential Campaign Activities hereby files this Supplemental Memorandum to inform the Court of a recent Committee action as it relates to the issue before the Court on plaintiffs' motion.

On February 19, 1974, the Committee voted not to hold public hearings on the relationship between dairy industry contributions and the President's 1971 milk price support decision, but, instead, to complete its investigation on this and other matters and proceed to compile its written report. This decision virtually eliminates any possible impact upon this litigation that might result from providing the subpoenaed materials to the Committee. Defendants have filed no opposition to plaintiffs' motion.

The only opposition to plaintiffs' motion has been lodged by the White House Custodian of Records. In its "Opposition to Plaintiffs' Motion for Clarification of Protective Order or In the Alternative for Modification Thereof," */ the Custodian admits that "there is little parallel between the events leading to issuance of the Protective Order and the uses to which the material might be put by the Senate Committee. . . ." Nevertheless, the

*/ The Committee has obtained from the Clerk of the Court a copy of the Custodian's Opposition inasmuch as the Custodian did not serve the Committee with a copy of its Opposition.

Custodian, without offering any particularized explanation of its position, asserts that the litigation "may well be compromised" if the Committee were enabled to publicly disclose these documents. The Custodian's failure to refer to recent public disclosure, by the parties, of a number of the subpenaed documents is particularly conspicuous. In any event, the Committee believes that the use of the materials solely in connection with its report would in no significant respect impinge upon the progress and fair judicial resolution of this litigation. In particular, with respect to the trial itself, there is no reason to believe that the Court will not be able fairly to assess the evidence.

In several respects, the Custodian questions the enforceability of the Committee's subpoenas. The Custodian's reliance on Judge Gesell's opinion in Senate Select Committee on Presidential Campaign Activities v. Nixon, No. 1593-73 (D.C. D.C. February 8, 1974), appeal pending No. 74-1258, for the proposition that a Congressional committee subpoena for documents relating to a civil litigation should not be enforced is wholly misplaced. Judge Gesell held that in his view the requirements of fair judicial administration in pending criminal proceedings in the circumstances of that case at that time outweighed the Committee's need for the subpenaed tapes. */ Whatever the correctness of that ruling, it has no applicability to the instant case--a civil proceeding to be tried by the Court, in which some of the evidence in question is being publicized by the parties themselves and concerning which no public Committee hearings are planned. **/

*/ In this regard, Judge Gesell specifically referred to the risk that pre-trial publicity would "bolster contentions that unbiased juries cannot be impaneled for trial." Senate Select Committee on Presidential Campaign Activities v. Nixon, *supra*.

**/ Contrary to counsel's assertion, the doctrine of collateral estoppel has no application here. As the case cited by counsel, Commissioner v. Sunnen, 333 U.S. 591 (1948), makes clear, the doctrine only bars a party in a subsequent suit from relitigating a matter "actually litigated and determined" in a prior suit between the same parties. Id. at 598. Here, the parties, the issues, and the surrounding circumstances are totally different from those present in the case before Judge Gesell.

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In its Opposition, the Custodian also asserts the novel proposition that the Committee cannot subpoena documents from a person unless they "belong" to that person. Whatever was intended by that word, the case law is clear that one who has mere possession or control of documents has a legal obligation to comply with a Congressional committee subpoena addressed to him for production of those documents. */

In summary, the subpoenaed documents are in counsel's possession and subject to production, no privilege applies, and any possible impact upon the litigation has been all but totally eliminated by the Committee's decision to forego public hearings. In such circumstances, plaintiffs' motion would not, as the White House Custodian of Records argues, make the Committee's subpoenas "take precedence" over this action. Instead, the Court is being asked to permit counsel to comply with a subpoena of a coordinate Branch of Government issued in furtherance of its orderly and properly legislative functions. See Sanders v. McClellan, 150 U.S. App. D.C. 58 463 F. 2d 894 (1972).

Respectfully submitted,



Samuel Dash
Chief Counsel

Fred Thompson
Minority Counsel

David M. Dorsen
Assistant Chief Counsel

James Hamilton
Assistant Chief Counsel

Alan S. Weitz
Assistant Counsel

W. Dennis Summers
Assistant Counsel

Attorneys for Senate Select
Committee on Presidential
Campaign Activities

February 21, 1974

*/ See McPhaul v. United States, 364 U.S. 372 (1960). The Custodian questions whether a "case or controversy" would exist if the Committee were to institute suit against plaintiffs' counsel to enforce its subpoena. See White House Custodian of Records "Points and Authorities in Opposition to Plaintiffs' Motion for Clarification of Protective Order or in the Alternative for Modification Thereof" at 3, n.2. As counsel accurately indicates, that issue is not before this Court on plaintiffs' motion. In any event, the existence or not of "adversary" in a suit between plaintiffs and the Committee would not be controlling. The only issue before this Court is the applicability of its December 21, 1973 Protective Order, an issue raised in an appropriate manner by plaintiffs' motion.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, et al.,)
)
)
Plaintiffs)
)
v.)
)
EARL BUTZ, et al.,)
)
Defendants.)

Civil Action No. 146-72

MEMORANDUM AND ORDER

Plaintiffs have filed a motion for clarification or alternatively for a modification of the December 21, 1973, protective order entered in this case. The reason advanced by plaintiffs is that on January 10, 1974, the Senate Select Committee on Presidential Campaign Activities (Committee) served upon William A. Dobrovir, one of counsel for the plaintiffs, a subpoena duces tecum for the production of some thirty items in his possession. The subpoena demanded that counsel as distinguished from the plaintiffs produce such items. Counsel declined to comply with the subpoena duces tecum, since he believed he was prohibited from doing so by the protective order.

On February 12, 1974, the Committee filed a motion for leave to file a brief amicus curiae in support of plaintiffs' motion for clarification or modification of the protective order. On February 21, 1974, the Committee filed a supplemental memorandum supporting its motion. The Committee's motion for leave to file a brief amicus curiae is granted and this Court in disposing of plaintiffs' motion has considered the Committee's brief and supplemental memorandum.

The protective order of December 21, 1973, directed counsel not to publicly disclose material submitted to them under subpoena "unless and until such material is publicly filed with the Court in some appropriate manner or otherwise appropriately

utilized in this judicial proceeding." That order resulted from Mr. Dobrovir's using a tape recording on an occasion unrelated to this litigation. Plaintiffs did not object to the entry of the 1/ order.

The thirtieth item listed in the February 12, 1974, Committee's subpoena duces tecum directed to William A. Dobrovir is that very tape recording as well as any summary or copy thereof. That tape recording and the other items listed in the Committee's subpoena were received by plaintiffs through their counsel as a result of a subpoena duces tecum served by plaintiffs on the Custodian. They are covered by the protective order

Similar subpoenas duces tecum were directed to Irving Jaffee, Acting Assistant Attorney General, and Irwin Goldbloom, Acting Deputy Assistant Attorney General, of the Department of Justice. Under date of January 21, 1974, Acting Assistant Attorney General Jaffee addressed a letter to Senator Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, in which he acknowledged receipt of the two subpoenas served upon him and Acting Deputy Assistant Attorney General Goldbloom. In that letter the Acting Assistant Attorney General stated that the Department of Justice had possession of the items listed in the attachment to the subpoenas by virtue of its representation as counsel for the Custodian of Records of the White House. It was also stated that certain other documents involved in this litigation were the subject of a subpoena served by the Committee on President Nixon and that the President declined to produce

1/ The tape recording concerned an alleged meeting of the President of the United States with certain dairy industry leaders on March 23, 1971 at the White House. This Court has neither seen nor heard that tape recording. Neither the President nor the Custodian of Records of the White House, Office of Management and Budget, and Council of Economic Advisers (Custodian) invoked the doctrine of executive privilege with respect to that tape recording. Indeed, it was turned over directly to William A. Dobrovir by one of counsel for defendants, who is also counsel for the Custodian.

the documents as he stated in his letter to Senator Ervin under date of January 4, 1974. Acting Assistant Attorney General Jaffee advised Senator Ervin of the December 21, 1973, protective order and stated the Government sought the protective order so as to protect against extra-judicial use of the material obtained by discovery proceedings in this litigation and to insure that the issues in this case be judicially resolved without impact of extra-judicial use of the evidence. Acting Assistant Attorney General Jaffee stated that he and Acting Deputy Assistant Attorney General Goldblum respectfully declined to comply with the subpoenas served by the Committee on the two of them.

The only reason that counsel for the plaintiffs and counsel for the defendants in this action have in their respective possessions the items listed in the subpoenas issued by the Committee was because they were counsel for the respective parties and the materials that they have in their possession were received as a result of a subpoena issued out of this Court against the Custodian. As the records in this case show, the subpoena issued by the plaintiffs in this case encompassed many items. With respect to most of them, the Custodian has asserted the executive privilege doctrine and those documents and one tape are in the possession of the Court for an in camera inspection. The items listed in the Committee's subpoenas to counsel were considered by the Custodian and he concluded that executive privilege should not be asserted with respect to them in this case.

Normal procedure, if followed, would have the Committee's subpoenas served not on counsel but either on the President or the Custodian of the Records, but the Committee has not seen fit to follow such a procedure. That it has authority to direct subpoenas to the President or Custodian or both is evident from Senate Resolution 60, 93d Cong., 1st sess., which established the

Committee and granted it authority to issue subpoenas. In 1973, the Committee acting pursuant to that resolution served upon the President of the United States a subpoena duces tecum commanding him to produce a number of documents. When the President refused to comply with the subpoena, the Committee brought an action in this Court to compel him to produce such documents. Senate Select Committee on Presidential Campaign Activities v. Richard M. Nixon, Civil Action No. 1593-73. On October 17, 1973, this Court (Sirica, C.J.) dismissed that action on the ground that this Court did not have jurisdiction. Following that dismissal, Congress enacted Public Law 93-190, 18 U.S.C. 1364, which granted this Court original jurisdiction to enforce or secure a declaration concerning the validity of any subpoena issued by the Committee to the President and to procure the production before the Committee of any information, document, tape recording, or other materials relevant to the matters the Committee is authorized to investigate. Thereafter the Committee filed an amendment to its complaint in Civil Action 1593-73, and thus renewed its application to this Court for the enforcement of the subpoena served on the President to obtain five tape recordings.

On February 8, 1974, this Court (Gesell, J.), while recognizing the case presented a justiciable controversy, denied injunctive relief directing the President to comply with the Committee's subpoena for the five tape recordings. Those tape recordings were five in number and allegedly related to conversations between the President and John Wesley Dean, III, counsel to the President at the time of the conversations. They were described as portions of taped conversations which dealt with "alleged criminal acts occurring in connection with the Presidential election of 1972." Those tapes were furnished the Watergate Special Prosecutor for presentation to a grand jury investigating the Watergate matter.

Unlike the tape recordings in Civil Action 1593-73, the materials sought here by the Committee's subpoenas served on counsel relate to a milk price order of 1971, which is the subject matter of this action. There is now pending in the United States District Court for the Western District of Missouri, Western Division, the case of United States of America v. Associated Milk Producers, Inc., et al., which is known as Midwest Milk Monopolization Litigation. In that case the defendant, Associated Milk Producers, Inc., has sought to obtain from the Government certain documents, among which are documents produced in this Court in this case for in camera examination. Judge Oliver of the United States District Court for the Western District of Missouri, in treating with the Associated Milk Producers, Inc., motion for production of such documents, entered a memorandum and order which, among other things, called upon the Special Watergate Prosecutor for any comments he might deem appropriate. Under date of March 5, 1974, Assistant Special Prosecutor Jon A. Sale addressed a letter to Judge Oliver. In that letter Sale advised that it would be highly undesirable for the Associated Milk Producers, Inc., to receive any of the material referred to by Judge Oliver in his memorandum and order. The Assistant Special Prosecutor pointed out that there is an ongoing grand jury investigation into political contributions made by either the Associated Milk Producers, Inc., or its Committee, TAPE, or both, and the possible attempts by Associated Milk Producers, Inc., to obtain favorable governmental action as a quid pro quo therefor. The Watergate Special Prosecution Force asserted strong opposition to any process which would serve as the first step in sacrificing the integrity of the grand jury process.

While it is true that the materials sought by the Committee from counsel for the parties in this case have already been furnished by the Custodian to the plaintiffs without any

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executive privilege being asserted, it nevertheless is the obligation of this Court to consider the integrity of the criminal process both before the grand jury and with respect to any resulting indictments involving the issuance of milk price orders in 1971. Among other things, that is what the December 21, 1973, protective order does.

Furthermore no showing has been made that the Committee is unable to obtain the material sought here from the President through the power given to the Committee. Whether the President would refuse to turn over the material is unknown. And if the President should refuse to comply, the question of the justification of his refusal would be the subject matter of litigation instituted by the Committee against the President.

In view of all of the foregoing, plaintiff's motion to clarify or modify the December 21, 1973, protective order will be denied. The order is clear on its face that it prohibits counsel either for the plaintiffs or for the defendants from disclosing any material obtained under a subpoena. The documents listed in the Committee's subpoena duces tecum to the counsel were so obtained by counsel.

It is therefore this 13rd day of March, 1974, without a hearing pursuant to local rule 1-9(e),

ORDERED that the motion of the Senate Select Committee on Presidential Campaign Activities for leave to file a brief amicus curiae be and the same is hereby granted;

FURTHER ORDERED that plaintiffs' motion to clarify or modify the December 21, 1973, protective order entered in this action be and the same is hereby denied; and

FURTHER ORDERED AND DECLARED that the protective order prohibits the disclosure by counsel for the parties of the material sought by the subpoenas of the Committee to anyone unless

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and until it is publicly filed with the Court in some appropriate manner or otherwise appropriately utilized in this judicial proceeding.

W. B. Jones
J U D G E

Counsel:

William A. Dobrovir
Andra N. Oakes
2005 L Street, N. W.
Washington, D. C. 20036

Attorneys for Plaintiffs

Irving Jaffee
Acting Assistant Attorney General
Irwin Goldblum
David J. Anderson
Attorneys, Department of Justice
Washington, D. C.

Attorneys for Defendants

David M. Dorsen
Assistant Chief Counsel
Counsel for the Senate Select Committee
On Presidential Campaign Activities
United States Senate
Washington, D. C. 20510

1972

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-64)
(Formerly D. C. Form No. 45a Rev. (8-49))

United States District Court

FOR THE
District of Columbia

2107-73

CIVIL ACTION FILE NO. _____

RICHARD DANNER, CHESTER C. DAVIS,
CAROL DUNKLE, WALTER GLAESER,
RALPH WINTZ and SUMMA CORPORATION.

Plaintiff

v.

THE SENATE SELECT COMMITTEE ON PRESIDENTIAL
CAMPAIGN ACTIVITIES, SAM J. ERVIN, JR., HOWARD H.
BAKER, JR., HERMAN E. TALMADGE, DANIEL K. INOUYE,
JOSEPH M. MONTOWYA, EDWARD J. GURNEY, LOWELL P.
WEICKER, JR., individually and as members of the
United States Senate and THE SENATE SELECT COMMITTEE
ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SAMUEL DASH,
and TERRY F. LENZNER,

Defendant

SUMMONS

To the above named Defendant : **Samuel Dash**

You are hereby summoned and required to serve upon

J. Joseph Barse

plaintiff's attorney , whose address

**Investment Building
1511 K Street, N. W.
Washington, D. C. 20005**

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an answer to the complaint which is herewith served upon you, within **60** days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES F. DAVEY

Clerk of Court

Evelyn H. Hartley

Deputy Clerk

Date: **NOV 8 7 1973**

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER)
48 Country Club Lane)
Las Vegas, Nevada 89109)
(702) 734-8243)

CHESTER C. DAVIS)
901 Lexington Avenue)
New York, New York 10021)
(212) 472-8847)

CAROL DUNKLE)
1600 South Sandhill)
Las Vegas, Nevada 89109)
(702) 457-8850)

WALTER GLAESER)
2 Tudor City Place)
New York, New York 10017)
(212) 682-6936)

RALPH WINTE) CIV. NO. 2107-73
3654 Rosecrest Circle South)
Las Vegas, Nevada 89121)
(702) 451-5805)

SUMMA CORPORATION) COMPLAINT
25th Floor Exxon Building) (for declaratory, injunctive
Houston, Texas 77002) and mandatory relief.)
(713) 228-8166)

Plaintiffs,)
- against -)

THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES)
and)
SAM J. ERVIN, JR.)
337 Old Senate Office Building,)
HOWARD H. BAKER, JR.)
2107 New Senate Office Building,)
HERMAN E. TALMADGE)
109 Old Senate Office Building,)
DANIEL K. INOUYE)
442 Old Senate Office Building,)
JOSEPH M. MONToya)
4107 New Senate Office Building,)
EDWARD J. GURNEY)
5107 New Senate Office Building,)
LOWELL P. WETCKER, JR.,)
individually and as members of)
the United States Senate and the)
Senate Select Committee on)
Presidential Campaign Activities)

and

SAMUEL DASH)
G-308 New Senate Office Building,)
TERRY F. LENZNER)
G-308 New Senate Office Building,)
individually and as counsel to)
the Senate Select Committee on)
Presidential Campaign Activities,)
Defendants.)

Plaintiffs, by their undersigned attorneys, as and for their
complaint against the defendants, allege as follows:

JURISDICTION AND VENUE

1. This action arises under the Due Process Clause of the Fifth Amendment to the United States Constitution; the Act of August 2, 1946, 84 Stat. 1151-53, Title 2, United States Code, Section 190a-1; the Act of June 22, 1938, 52 Stat. 942, Title 2, United States Code, Section 192; Senate Resolution 60 (93d Cong. 1st Sess.) and the Rules of Procedure and Guidelines governing the defendant Senate Select Committee on Presidential Campaign Activities. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1331, 1332, 1361, 2201, 2202 and this Court's common law jurisdiction. Venue is based upon Title 28, United States Code, Section 1391(b) and (e).

2. Plaintiff Summa Corporation (hereinafter "Summa") is a corporation duly organized and existing under the laws of the State of Delaware.

3. Plaintiffs Richard Danner, Carol Dunkle and Ralph Winte are all employees of plaintiff Summa and all reside in the State of Nevada.

4. Plaintiff Chester C. Davis is an attorney, a member of the bar of the State of New York and a resident of that state. He is General Counsel to plaintiff Summa, and counsel to plaintiffs Richard Danner, Carol Dunkle, Walter Glaser and Ralph Winte.

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5. Plaintiff Walter Glæsner is an employee of the plaintiff Chester C. Davis and a resident of the State of New York.

6. Upon information and belief, defendant Sam J. Ervin, Jr. is a member of the United States Senate and Chairman of the defendant Senate Select Committee on Presidential Campaign Activities (hereinafter "the Committee"). Upon information and belief, defendants Howard H. Baker, Jr., Herman E. Talmadge, Daniel K. Inouye, Joseph M. Montoya, Edward J. Gurney and Lowell P. Weicker, Jr., are members of the United States Senate and members of the defendant Committee.

7. Upon information and belief, defendant Committee was authorized by the Senate of the United States to recommend legislation for the future conduct of presidential campaigns and to investigate the 1972 presidential campaign in that regard, pursuant to Senate Resolution 60, 93rd Congress, 1st Session.

8. Upon information and belief, defendants Samuel Dash and Terry F. Lenzner are Chief Counsel and Assistant Chief Counsel to the Committee.

9. Upon information and belief, all defendants reside or have a place of business, and this claim arose, within this judicial district and none of the defendants is a citizen of the States of Nevada, Delaware or New York. The matter in controversy exceeds \$50,000, in that unless the relief requested herein is granted, plaintiffs will suffer irreparable damage to their rights, including their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution, in excess of \$50,000, and be forced to incur expenses in excess of that amount in connection with illegal and improper proceedings pursuant to subpoenas issued by the defendants.

CLAIM FOR RELIEF

Right to Testify at Public Hearing.

10. During the last two months, plaintiffs have voluntarily provided extensive and detailed information to the staff of the defendant Committee in response to wide-ranging questioning by the

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Committee, including extensive sessions in which a record was made of the questions propounded and answers given.

11. Following plaintiffs' voluntary statements to the staff of the defendant Committee, stories appeared in the press and other media containing incomplete, distorted and speculative accounts of the information obtained from the plaintiffs by the staff of the defendant Committee. Upon information and belief, the aforesaid incompleteness, distortion and speculation was a result of the fact that the press and other media had been excluded from the proceedings of the defendant Committee at which the plaintiffs gave their statements. Said reporting has inflicted and continues to inflict irreparable injury upon the plaintiffs.

12. On November 6, 1973 plaintiff Davis advised the defendant Lenzner that he and his clients stood ready and willing to testify before the defendant Committee but that any such testimony should be taken at a public hearing as required by law.

13. Following plaintiffs' statement of their readiness to testify at public hearings as alleged in paragraph 12 above, seven subpoenas ad testificandum and duces tecum, issued in the name of defendant Senators Ervin and Baker and addressed to plaintiffs, were delivered to the office of plaintiff Davis on November 15, 1973.

14. On November 18, 1973 plaintiff Davis, on his own behalf, and on behalf of his clients, sent a telegram to Senator Ervin, again requesting that the plaintiffs' testimony be taken at a public hearing of the Committee and further requesting a hearing before the Committee on plaintiffs' objections to the subpoenas duces tecum. A copy of this telegram is attached hereto as Exhibit A.

15. By telegram dated November 20, 1973, a copy of which is attached hereto as Exhibit B, Senator Ervin responded to plaintiffs' November 18, 1973 telegram. Said response made no mention of the requests contained in plaintiffs' November 18, 1973 telegram, but, instead, threatened plaintiffs with proceedings to hold them in contempt of the Senate.

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16. By telegram dated November 23, 1973, a copy of which is attached hereto as Exhibit C, defendant Lenzner stated that plaintiffs' request that their testimony be given in public had been denied and that plaintiffs' request to be heard by the Committee on their objections was likewise denied.

17. By telegrams dated November 23 and 24, 1973, copies of which are attached hereto as Exhibits D and E, plaintiffs again requested that their testimony be taken at a public hearing and that plaintiffs be afforded an opportunity to be heard by the Committee on their objections. In particular, plaintiffs' telegram of November 24, 1973 stated plaintiffs' understanding of the telegram from the defendant Lenzner described in paragraph 16 above, as being (a) that the Committee has denied plaintiffs' request for a hearing; (b) that one of the points to be raised at such hearing -- the right to testify in public -- had been denied without a hearing; (c) that the matter is now ripe for judicial determination.

18. Defendants' denial of plaintiffs' request that their testimony be taken at a public hearing is violative of 2 U.S.C. § 190a-1(b) which requires that the testimony of a witness before a Senate committee

* * * shall be taken in a public session
unless the Committee determines the
testimony to be taken at that hearing
may relate to a matter of national security,
may tend to reflect adversely on the char-
acter or reputation of the witness or any
other individual or may divulge matters
deemed confidential under other provisions
of law or Government regulation * * *.
[Emphasis supplied.]

Upon information and belief, no such determination as required by the aforesaid statute for the taking of testimony in other than public hearing has been made by the Committee and none could be made because the testimony of the plaintiffs (a) does not relate to national security; (b) will not divulge matters deemed confidential under other provisions of law and could not divulge any ~~such~~ confidential matters because the

subject matter of their testimony has already been widely disseminated in the media; and (c) will not reflect adversely on the character or reputation of the witness or any other individual. On the contrary, a public hearing is essential to protect the witnesses and others from the damage which is inflicted by partial and distorted reporting of testimony given at secret hearings.

Right to Hearing on Objections to Subpoenas Duceas Tecum.

19. As alleged in paragraph 14 above, plaintiffs have requested a hearing before defendant Committee on plaintiffs' objections to the subpoenas duces tecum. The rules of procedure adopted by the defendant Committee require that plaintiffs be accorded a hearing and determination of their objections to said subpoenas.

20. As alleged in paragraphs 15 and 16 above, defendants, in violation of their own rules, have denied plaintiffs' request for a hearing on plaintiffs' objections to said subpoenas duces tecum and, instead, have threatened plaintiffs with contempt proceedings unless plaintiffs comply with said subpoenas without having been accorded the requisite hearing on their objections.

The Irreparable Harm to Plaintiffs.

21. As alleged more particularly above, defendants

(a) are requiring that plaintiffs testify in secret in violation of the requirement of 2 U.S.C. § 190a-1(b) that such testimony be taken in public unless the Committee makes certain determinations, which determinations must, by the Committee's Rules, be made after notice and opportunity to be heard;

(b) are requiring that plaintiffs comply with subpoenas without giving plaintiffs the hearing specified by defendants' own rules as to plaintiffs' objections to said subpoenas; and

(c) are threatening to initiate proceedings to hold plaintiffs in contempt of the Senate by reason of plaintiffs' exercise of their rights as described herein.

Said conduct of the defendants is causing and threatening to cause grave and irreparable harm to the plaintiffs and deprives them of due process of law in violation of applicable statutes and legal principles and the Due Process Clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiffs respectfully pray

1. That the Court adjudge and decree that (a) plaintiffs may not be required to testify at any proceeding other than a public hearing pursuant to the provisions of 2 U.S.C. § 190a-1(b) unless and until the defendant Committee has made an appropriate determination pursuant to said statute that a public hearing is not required; (b) plaintiffs are entitled to a hearing and appropriate determination by the defendant Committee on their objections to subpoenas issued by the defendants before the plaintiffs can be required to comply with said subpoenas or punished or threatened with punishment for failure to comply; and (c) defendants have no right, authority or power to initiate or threaten to initiate contempt proceedings against plaintiffs by reason of plaintiffs' exercise of their rights as adjudicated and decreed herein;

2. That the Court issue its preliminary and permanent injunction enjoining the defendants, their servants, agents and employees, and all persons acting in concert with them (a) from requiring plaintiffs to testify at any proceeding other than a public hearing pursuant to the provisions of 2 U.S.C. § 190a-1(b) unless and until the defendant Committee has made an appropriate determination pursuant to said statute that a public hearing is not required; (b) from requiring plaintiffs to comply with subpoenas issued by the

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defendants without first granting plaintiffs a hearing on plaintiffs' objections to said subpoenas and making an appropriate determination of such objections; and (c) from initiating or threatening to initiate contempt proceedings against plaintiffs by reason of any refusal by plaintiffs to comply with subpoenas issued by defendants prior to being accorded a hearing on, and appropriate determination of, plaintiffs' objections to said subpoenas and request for a public hearing;

3. That the Court issue its writ of mandamus directed to the defendants commanding that plaintiffs be granted a hearing and appropriate determination by the defendant Committee on plaintiffs' objections to subpoenas and request for a public hearing prior to the initiation or threatened initiation of any contempt proceedings against plaintiffs by reason of their failure to comply with such subpoenas; and

4. That the Court grant such other and further relief as to the Court seems just and proper in the premises.

Dated this 27th day of November, 1973.

DAVIS & COX

By: Chester C. Davis

One State Street Plaza
New York, New York 10004
(212) 425-0500

Attorneys for Plaintiffs

Of Counsel:

J. Joseph Barse
J. Joseph Barse

Investment Building
3511 K Street, N. W.
Washington, D. C. 20005
(202) 347-4270

1981

EXHIBIT A

VIA WESTERN UNION STRAIGHT WIRE - SUNDAY, NOVEMBER 18, 1973

HONORABLE SAM J. ERVIN, JR.
CHAIRMAN, SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES
ROOM G-308 NEW SENATE OFFICE BUILDING
WASHINGTON, D. C.

THURSDAY AFTERNOON NOVEMBER 15 YOUR STAFF DELIVERED TO MY OFFICE SEVEN SUBPOENAS AD TESTIFICANDUM AND DUCES TECUM UNDER THE NAMES OF SENATOR BAKER, JR. AND SENATOR ERVIN, JR. AND ADDRESSED TO PERSONS I REPRESENT. ONE WAS RETURNABLE THE FOLLOWING MORNING, NOVEMBER 16, FOUR WERE RETURNABLE NOVEMBER 19, ONE NOVEMBER 26 AND ONE NOVEMBER 27. AT THE SAME TIME MY SECRETARY WAS ADVISED THAT YOUR STAFF DESIRED TO ARRANGE FOR THE SERVICE OF SIMILAR SUBPOENAS FOR EIGHT OTHER PERSONS I ALSO REPRESENT FOR SOME TIME THE UNDERSIGNED AND, HIS CLIENTS HAVE FULLY COOPERATED WITH YOUR STAFF. WE SUBMITTED TO LENGTHY INTERVIEWS ON SEVERAL OCCASION AND FURNISHED INFORMATION REQUESTED, EVEN THOUGH IT APPEARED TO BE UNRELATED OR AT BEST FAR AFIELD FROM THE PRESIDENTIAL CAMPAIGN OF 1972 OR THE ENABLING RESOLUTION. IN LATE OCTOBER I INFORMED YOUR STAFF THROUGH MESS. LENZNER AND ARMSTRONG THAT IF REQUESTED, I WOULD APPEAR AND ARRANGE TO PRODUCE AS WITNESSES THE PERSONS REQUESTED AND THAT I WOULD ACCEPT SUBPOENA ON THEIR BEHALF IN THE EVENT THE COMMITTEE DESIRED TO HOLD PUBLIC EVIDENTIARY HEARINGS INVOLVING THOSE PERSONS, IF I WAS GIVEN SUFFICIENT ADVANCE NOTICE SO AS TO PERMIT A REASONABLE ACCOMMODATION WITH COMMITMENTS INVOIATED OTHER GOVERNMENTAL AGENCIES AND JUDICIAL PROCEEDINGS. I ALSO EXPLAINED TO YOUR STAFF IN SOME DETAIL THE EXTENT TO WHICH INQUIRIES INTO CERTAIN AREA WOULD INTERFERE WITH ON-GOING JUDICIAL PROCEEDINGS. IN VIEW OF THE DETAILED INFORMATION WHICH WAS GIVEN DURING VARIOUS INVESTIGATORY AND RECORDED INTERVIEWS, IT WAS MY POSITION THAT HENCEFORTH WE WOULD APPEAR ONLY IN CONNECTION WITH A PUBLIC EVIDENTIARY HEARING HELD IN ACCORDANCE WITH THE PROVISIONS OF YOUR RULES OF PROCEDURE, APPLICABLE STATUTORY

1982

PAGE TWO

PROVISIONS AND LEGAL PRINCIPLES. THEREAFTER YOUR STAFF MAILED TO MY CLIENT, SUMMA CORPORATION, TWO SUBPOENAS DUCES TECUM RECEIVED IN NEVADA ON FRIDAY, NOVEMBER 2 AND RETURNABLE THE FOLLOWING MONDAY, NOVEMBER 5, TO WHICH I RESPONDED BY TELEGRAM DATED NOVEMBER 4, 1973, ADDRESSED TO SENATOR ERVIN, JR. AFTER A FURTHER LENGTHY TELEPHONE CONVERSATION WITH MR. LENZNER, I WAS NOT GIVEN AN OPPORTUNITY TO BE HEARD BY THE COMMITTEE AS REQUESTED.

THE ADDITIONAL SUBPOENAS DELIVERED TO MY OFFICE THURSDAY AFTERNOON ARE IMPROPER, BURDENOME AND OPPRESSIVE. FURTHERMORE, I AM INFORMED AND BELIEVE THAT THEY ARE NOT FOR THE PURPOSE OF AN APPEARANCE IN A PUBLIC EVIDENTIARY HEARING BUT RATHER ARE INTENDED FOR FURTHER SECRET INVESTIGATIVE INQUIRIES IN AREAS WHICH ARE UNRELATED TO THE PRESIDENTIAL CAMPAIGN OF 1972 OR THE ENABLING RESOLUTION AND WHICH ALSO INVOLVE FACTUAL ISSUES IN PENDING JUDICIAL PROCEEDINGS.

I AGAIN RESPECTFULLY REQUEST AN OPPORTUNITY TO PRESENT TO THE COMMITTEE MY OBJECTIONS TO THE ABOVE-MENTIONED SUBPOENAS AND I FURTHER RESPECTFULLY SUGGEST THAT THE POWER TO ISSUE SUBPOENAS UNDER YOUR RESPECTIVE NAMES IS BEING ABUSED. I REGRET THAT PRE-EXISTING COMMITMENTS DO NOT PERMIT ME TO BE AVAILABLE TO APPEAR BEFORE THE COMMITTEE BEFORE MONDAY, NOVEMBER 26 OR TUESDAY, NOVEMBER 27 AND SUBSEQUENT TO DECEMBER 1 AT SUCH TIME AS YOU MAY DESIGNATE.

I AM SENDING A CONFIRMATION COPY OF THIS TELEGRAM TO MESSRS. SAMUEL DASH AND FRED THOMPSON FOR THEIR RESPECTIVE INFORMATION.

CHESTER C. DAVIS
ONE STATE STREET PLAZA
NEW YORK, N. Y.

1983

EXHIBIT B

Telegram

YSB235(1428)(1-028163A325)PD 11/21/73 1416

ICS IPMHAUD USN

09001 SVC WASHINGTON DC 11-21 210P EBT

ICS IPMYSCH

NYK

RE YOUR 1-0167163A325 11/21/73 1155

0205G SVC YS NYK 11-21 113GA EST

RE DUPE TO CHESTER C DAVIS 1 STATE ST PLAZA 30 ETC

HW COPY FILED 235P AND TRANSMITTED 1445EST

10117 WASHINGTON DC 59 11-20 235P EST

PMS CHESTER C DAVIS

ONE STATE ST PLAZA

NEWYORK NY

OUR TELEGRAM OF NOVEMBER 19, 1973 LEAVES THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES NO ALTERNATIVE EXCEPT TO CONSIDER THE QUESTION OF WHETHER TO ASK THE SENATE

425-0500 R⁸

SMA 2408 VBJLsu

COR

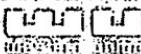
Telegram

TO PROCEED AGAINST YOU AND THE WITNESSES DULY SUBPOENAED, WHOM YOU HAVE ADVISED TO ABSENT THEMSELVES FROM EXECUTIVE SESSIONS OF THE SELECT COMMITTEE FOR CONTEMPT OF THE SENATE (SSC) SAM J ERVIN JR UES (CHAIRMAN SENATE SELECT) COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

NNNN

1984

EXHIBIT C



Telegram

NY1171(1833)(1-032101A327)PD 11/23/73 1830

ICS IPMRAVA WSH

10028 GOVT HFWASHINGTON DC 222 11-23 542P EST

PMS DAVID DUBIN

CARE DAVIS AND COX

1-STATE STREET PLAZA

NEW YORK, NY

DEAR MR. DUBIN:

THIS IS TO ADVISE THAT I RETURNED YOUR CALL AT APPROXIMATELY
2:30 P.M. TODAY, NOVEMBER 23, 1973, AND YOU REQUESTED MR. DAVIS
TO APPEAR MONDAY BEFORE THE FULL COMMITTEE TO OBJECT TO SUBPOENAS.
I ADVISED THIS WAS NOT POSSIBLE AND THAT REQUESTS FOR PUBLIC HEARINGS
HAD BEEN DENIED. I ALSO ADVISED THAT DAVIS SHOULD INDICATE WHEN HE
IS PREPARED TO COMPLY WITH PREVIOUSLY SERVED SUBPOENA ON HIM THAT HE
IS IN VIOLATION OF PURSUANT TO SEN. ERVIN'S TELEGRAM. YOU THEN
ADVISED VINIE SUBPOENAED FOR MON. AT 2:00 P.M. AND DANNER

BR-1001 (05-49)

AT 2:00 P.M. TUESDAY AND THAT THEY WOULD APPEAR AND COMPLY
WITH THEIR SUBPOENAS COULD BE RAISED AT THOSE TIMES.
I SO ADVISED CHIEF COUNSEL DASH AND OTHER STAFF THAT VINIE AND
DANNER WOULD BE IN COMPLIANCE AND SOUGHT TO FIND AVAILABLE
SENATOR FOR MONDAY. I CALLED YOU AGAIN AT 4:40 P.M. ON
NOVEMBER 23, 1973, TO ADVISE DIFFICULTY IN OBTAINING SENATOR
FOR MONDAY. YOU ADVISED ME THEN VINIE AND DANNER MAY NOT
COMPLY WITH THEIR SUBPOENAS AND YOU WERE PREPARING TELEGRAM TO US.
YOU REFUSED TO ADVISE ME WHETHER VINIE AND DANNER SUBPOENAS WILL BE
COMPLIED WITH WHICH ARE AD TESTIFICANDUM AND DUCES TECUM.
AS A RESULT, I ADVISED YOU HAD MISREPRESENTED AND MISLED THIS
COMMITTEE BY PRIOR TELEPHONIC COMMUNICATION.
BE ADVISED VINIE AND DANNER SUBPOENAS HAVE BEEN PROPERLY SERVED
AND MUST BE COMPLIED WITH. CC: VINIE DANNER

BR-1001 (05-49)

TERRY LENZNER
ASS'T CHIEF COUNSEL

NNNN

1985

EXHIBIT D

[VIA WESTERN UNION STRAIGHT WIRE - FRIDAY, NOVEMBER 23, 1973]

HONORABLE SAM J. ERVIN, JR.
CHAIRMAN, SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES
ROOM C-308 NEW SENATE OFFICE BUILDING
WASHINGTON, D.C.

REFERRING TO TELEGRAMS TO YOU DATED NOVEMBER 4 AND 18 AND NUMEROUS PHONE CONVERSATIONS WITH MR. LENZNER OF YOUR STAFF, I AM REQUESTING A HEARING BY THE COMMITTEE PURSUANT TO THE PUBLISHED RULES OF PROCEDURE OF THE COMMITTEE AND APPLICABLE LEGAL PRINCIPLES WITH RESPECT TO CERTAIN SUBPOENAS REFERRED TO IN THOSE TELEGRAMS.

MY REQUEST IS BASED, INTER ALIA, TO (a) THE RIGHT OF A WITNESS PURSUANT TO 2 U.S.C. § 190a-1(b) TO GIVE TESTIMONY AT A PUBLIC HEARING, AND (b) THE RIGHT TO REASONABLE SCOPE, PARTICULARITY AND PERTINENCE OF A SUBPOENA DUCES TECUM.

I AM UNABLE TO ASCERTAIN FROM YOUR TELEGRAM OF NOVEMBER 18 OR FROM CONVERSATIONS WITH YOUR STAFF WHETHER MY REQUEST FOR SUCH A HEARING HAS BEEN REJECTED. I HEREBY RESPECTFULLY RENEW SUCH REQUEST AND ADVISE THAT I WILL BE AVAILABLE TO ATTEND SUCH A HEARING AT ANY TIME ON NOVEMBER 26 OR NOVEMBER 27. MY CLIENTS AND I WILL BE AVAILABLE TO APPEAR BEFORE THE COMMITTEE AFTER AN APPROPRIATE DETERMINATION BY THE COMMITTEE PURSUANT TO ITS RULES OF PROCEDURE AND APPLICABLE LEGAL PRINCIPLES.

IN THE EVENT A DETERMINATION HAS ALREADY BEEN MADE WITHOUT GIVING ME AN OPPORTUNITY TO BE HEARD, REQUIRING MY CLIENTS TO APPEAR PURSUANT TO THOSE SUBPOENAS, PLEASE SO ADVISE ME TO THAT EFFECT IN SUCH MANNER AS WILL PERMIT ME TO OBTAIN A JUDICIAL DETERMINATION. IF, ON THE OTHER HAND, SUCH A DETERMINATION HAS NOT BEEN MADE, PLEASE ADVISE WHEN I MAY BE HEARD BY THE COMMITTEE.

COPIES OF THIS TELEGRAM HAVE BEEN SENT TO MESSRS. DASH, THOMPSON AND LENZNER FOR THEIR INFORMATION.

CHESTER C. DAVIS
ONE STATE STREET PLAZA
NEW YORK, N.Y. 10004

1986

EXHIBIT E

[VIA WESTERN UNION STRAIGHT WIRE - SATURDAY, NOVEMBER 24, 1973]

HONORABLE SAM J. ERVIN, JR.
CHAIRMAN, SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES
ROOM G-308 NEW SENATE OFFICE BUILDING
WASHINGTON, D.C.

I AM SERIOUSLY CONCERNED ABOUT THE CONFUSION THAT IS DEVELOPING AS A RESULT OF THE VARIOUS VERBAL AND TELEGRAPHIC EXCHANGES BETWEEN OUR ASSOCIATES. THE LATEST EXAMPLE IS THE TELEGRAM TO MR. DUBIN FROM MR. LENZNER WHICH APPARENTLY WAS SENT BEFORE YOU RECEIVED MY TELEGRAM OF LAST EVENING.

THE POINT OF MY TELEGRAM OF LAST EVENING WAS TO RESPECTFULLY SUBMIT THAT UNDER YOUR PROCEDURAL RULES AND APPLICABLE STATUTES AND LEGAL PRINCIPLES (A) I AM ENTITLED TO A HEARING BY THE COMMITTEE WITH RESPECT TO MY OBJECTIONS TO THE SUBPOENAS WHICH I HAVE RECEIVED AND, (B) AFTER AN APPROPRIATE DETERMINATION AS TO MY OBJECTIONS TO THOSE SUBPOENAS, THE PERSONS REQUIRED TO TESTIFY BY SUCH SUBPOENAS ARE ENTITLED TO APPEAR AND TESTIFY AT A PUBLIC HEARING.

IT IS MY UNDERSTANDING OF MR. LENZNER'S TELEGRAM OF YESTERDAY THAT (A) THE COMMITTEE HAS DENIED MY REQUEST FOR A HEARING; (B) THE COMMITTEE HAS DETERMINED THAT THE PERSONS SUBPOENAED ARE NOT TO HAVE A PUBLIC HEARING, AND, ACCORDINGLY, (C) THE MATTER IS NOW RIPE FOR JUDICIAL DETERMINATION.

IF I AM IN ERROR IN THAT UNDERSTANDING, PLEASE ADVISE WHEN AND WHERE SUCH HEARING IS TO BE HELD. THE WITNESSES AND I CONTINUE TO STAND READY FOR SUCH A HEARING ON MONDAY OR TUESDAY, IF I AM PROMPTLY SO ADVISED.

COPIES OF THIS TELEGRAM ARE BEING SENT TO MESSRS. DASH, THOMPSON AND LENZNER FOR THEIR INFORMATION.

CHESTER C. DAVIS
ONE STATE STREET PLAZA
NEW YORK, NEW YORK 10004

1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

RICHARD DANNER, et al.,

Plaintiffs,

-against-

THE SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES,
et al.,

Defendants

JAMES F. DAVEY, CLERK

CIV. NO. 2107-73

STIPULATION

STIPULATION

IT IS HEREBY STIPULATED by and among the parties to this lawsuit by their undersigned counsel that all officers and/or employees of the Summa Corporation to whom the Senate Select Committee on Presidential Campaign Activities, since the filing of this lawsuit on November 27, 1973, has issued or may issue subpoenas ad testificandum and/or duces tecum shall be deemed parties plaintiffs to this lawsuit without formal amendment to the complaint, upon their notification in writing to the Court of their intention to be included as parties plaintiffs, and shall be bound by any judgment rendered by the Court in this action.

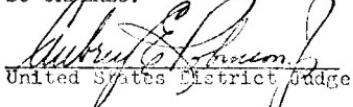

J. Joseph Barse

Investment Building
1511 K Street, N.W.
Washington, D.C. 20005
(202) 347-4270

Attorney for Plaintiffs

DATED: December 3, 1973

SO ORDERED:


United States District Judge


James Hamilton
Assistant Chief Counsel
Senate Select Committee on
Presidential Campaign Activities
Dirksen Senate Office Building
Washington, D.C. 20510
(202) 225-0531

Attorney for Defendants

1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,) CIV. NO. 2107-73
-against-)
THE SENATE SELECT COMMITTEE ON) NOTICE TO COURT PURSUANT
PRESIDENTIAL CAMPAIGN ACTIVITIES,) TO STIPULATION BETWEEN THE
et al.,) PARTIES OF DECEMBER 3, 1973
Defendants.)

NOTIFICATION

Pursuant to the Stipulation entered into between counsel and approved by this Honorable Court on December 3, 1973, the Court is hereby notified by the law firm of Davis & Cox, counsel to all of the plaintiffs in the above-captioned matter as well as counsel to all officers and/or employees of Summa Corporation upon whom the Senate Select Committee on Presidential Campaign Activities has served subpoenas ad testificandum and subpoenas duces tecum on or after November 27, 1973, that all such officers and/or employees intend to be included as parties plaintiffs to this lawsuit and hereby agree to be bound by any judgment rendered by this Court in this action.

Respectfully submitted,

DAVIS & COX
John W. H.
One State Street Plaza
New York, New York 10004
(212) 425-0500

Of Counsel:

J. Joseph Barse
Investment Building
1511 K Street, N. W.
Washington, D. C. 20005
(202) 347-4270

1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,) CIV. NO. 2107-73
- against -) APPLICATION FOR TEMPORARY
THE SENATE SELECT COMMITTEE ON) RESTRAINING ORDER AND
PRESIDENTIAL CAMPAIGN ACTIVITIES,) REQUEST FOR HEARING
et al.,)
Defendants.)

1. Plaintiffs respectfully move this Honorable Court for a temporary restraining order restraining defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, pending the hearing and determination of plaintiffs' motion for a preliminary injunction, (a) from requiring plaintiffs to testify or produce documents at any proceeding other than a public hearing pursuant to the provisions of 2 U.S.C. §190a-1(b); and (b) from initiating or threatening to initiate contempt proceedings against plaintiffs by reason of any refusal by plaintiffs to give evidence in secret.

2. The grounds for this application, as more fully set forth in the complaint filed herein, the annexed affidavit of Chester C. Davis and the annexed memorandum of points and authorities, are that:

(a) The defendants are compelling the plaintiffs to testify in secret contrary to the statute which controls the conduct of the defendant Committee.

1990

- 2 -

(b) The defendants are threatening to initiate contempt proceedings against plaintiffs unless they surrender the aforesaid rights.

(c) Subpoenas requiring action violative of such rights are returnable this date and successive dates in the following week.

(d) Unless the relief sought is granted, the injury to plaintiffs pending hearing and determination of the motion for a preliminary injunction will be irreparable.

(e) No injury will be sustained by the defendants or by the public through issuance of a temporary restraining order.

3. Because of the urgent necessity for immediate relief, plaintiffs respectfully request a hearing at the earliest convenience of the Court.

4. This motion is based upon the matter described in paragraph 2 above and such other evidence and argument as may be adduced at or prior to the hearing on this application.

DAVIS & COX

By: Cl. T. Davis

One State Street Plaza
New York, New York 10004
(212) 425-0500

Attorneys for Plaintiffs

Dated this 5th day of December, 1973.

Of Counsel:

J. Joseph Barse
Investment Building
1511 K Street, N. W.
Washington, D. C. 20005
(202) 347-4270

1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,)
-against-) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON) TEMPORARY RESTRAINING ORDER
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)

Upon the affidavit of Chester C. Davis, sworn to the 5th day of December, 1973, the exhibits thereto, the complaint herein, the plaintiffs' application for a temporary restraining order and the memorandum of points and authorities in support thereof; and

IT APPEARING that the defendants are threatening actions which will deprive plaintiffs of their statutory rights and of due process of law and which will inflict grave and irreparable damage upon plaintiffs before a hearing can be had on plaintiffs' motion for a preliminary injunction, it is hereby

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, be, and they hereby are, temporarily restrained (a) from requiring plaintiffs to testify or produce documents at any proceeding other than a public hearing pursuant to the provisions of 2 U.S.C. §190a-1(b); and (b) from initiating or threatening to initiate contempt proceedings against plaintiffs by reason of any refusal by plaintiffs to give evidence at any proceeding other than a public hearing; and

IT IS FURTHER ORDERED that the defendants be, and they hereby are, directed to show cause, before this Court at _____ p.m. on _____, 19____, why the plaintiffs' motion for preliminary injunction should not be granted; and

1992

- 2 -

IT IS FURTHER ORDERED that this temporary restraining order shall expire at ____ o'clock p.m. on _____, 19____, unless it is further extended by order of this Court; and

IT IS FURTHER ORDERED that this temporary restraining order may be served by any person over the age of eighteen years, selected for that purpose by the plaintiffs.

Dated _____ o'clock p.m.
_____, 19____.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,) CIV. NO. 2107-73
-against-) MOTION FOR
THE SENATE SELECT COMMITTEE ON) PRELIMINARY INJUNCTION
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)

Plaintiffs, by their undersigned attorneys, respectfully move this honorable Court for a preliminary injunction enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them (a) from requiring plaintiffs to testify at any proceeding other than a public hearing pursuant to the provisions of 2 U.S.C. § 190a-1(b) unless and until the defendant Committee has made an appropriate determination based upon facts of record before the Committee that a public hearing is not required pursuant to said statute; and (b) from initiating or threatening to initiate contempt proceedings against plaintiffs by reason of any refusal by plaintiffs to give evidence at secret hearings unless and until the defendants have made an appropriate determination as described in paragraph (a) above.

The grounds for this motion, as more fully set forth in the complaint and the affidavit of Chester C. Davis and memorandum of points and authorities filed herein, are that:

(a) Unless restrained by this Court, the defendants will perform the acts sought to be enjoined and such acts will deprive plaintiffs of their statutory rights and of due process of law and otherwise cause irreparable injury, loss and damage to the plaintiffs; and

(b) The issuance of a preliminary injunction herein will

1994

-2-

prevent irreparable injury to the plaintiffs and will vindicate the public interest, but will not cause undue inconvenience or loss to the defendants.

DAVIS & COX

By: 

One State Street Plaza
New York, New York 10004
(212) 425-0500

Attorneys for Plaintiffs

Of Counsel:

J. Joseph Barse
Investment Building
1511 "K" Street, N.W.
Washington, D.C. 20005
(202) 347-4270

1995

CERTIFICATE

I hereby certify that at 5:50 a.m. on December 5, 1973, I telephoned James Hamilton, Esq., the attorney representing all of the defendants and informed him that the plaintiffs herein would seek to obtain a temporary restraining order from this Court.

I further certify that I caused to be delivered to James Hamilton, Esq., the plaintiffs' moving papers at 9:30 a.m. of December 5, 1973 and advised him that the hearing on the within application would be heard at 9:45 by this Court.

David S. Dubin

David S. Dubin

1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,)
-against-) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)
)

AFFIDAVIT OF
CHESTER C. DAVIS

District of Columbia, ss:

CHESTER C. DAVIS, being duly sworn, deposes and says:

1. I am an attorney-at-law, one of the plaintiffs in this action, General Counsel of plaintiff Summa Corporation, and counsel to all of the remaining plaintiffs herein. As such, I am fully familiar with all the facts and issues raised by the complaint and this application.

2. I submit this affidavit in support of the plaintiffs' application for a temporary restraining order restraining the defendants from requiring plaintiffs to testify or produce evidence at any proceeding other than a public hearing pursuant to the provisions of 2 U.S.C. §190a-1(b).

3. I wish to make clear at the outset that my clients and I have no objection to testifying before a public session of the defendant Senate Select Committee on Presidential Campaign Activities ("the Committee"). We apply to this Court--not to be relieved from the requirement that we testify--but to vindicate

our statutory and constitutional right to testify at a hearing to which the public and press are admitted. We seek--not to withhold information from the Committee--but to prevent the Committee from withholding information from the public. We assert a statutory right to have all of our testimony taken in public. The Committee claims a right to tell the public only so much of our testimony as it chooses to tell, without regard to the prejudicial effect of distorted and incomplete news accounts which invariably follow the giving of testimony in secret hearings from which the press and public are excluded.

4. The principal facts in support of this application, as shown more specifically below, are as follows:

(a) The statute which governs the conduct of the defendant Committee requires that testimony be taken in public unless the Committee makes a determination that the statutory conditions for requiring secret testimony have been satisfied;

(b) The defendant Committee issued subpoenas requiring the plaintiffs to testify in secret without ever having made--or even purporting to have made--the determination required by statute as a prerequisite to compelling a witness to testify in secret;

(c) Plaintiffs requested that they be permitted to testify in public because (i) plaintiffs' earlier voluntary statements to the Committee had been followed by distorted, incomplete and speculative stories in the news media concerning the subject of their statements and (ii) public testimony was the only way to avoid such prejudice;

(d) When plaintiffs requested that their testimony be taken in public, the defendant Committee threatened to hold them in contempt of the Senate unless they testified in secret, even though the Committee had not made the statutorily required determination that secret testimony was lawful;

(e) After the plaintiffs filed and served the complaint herein seeking judicial relief from the aforesaid violation of their statutory and other rights, then--and only then--the defendant Committee adopted a resolution purporting to make a blanket determination that the testimony of all of the plaintiffs and other related witnesses could lawfully be taken in secret;

(f) There is no factual basis whatever in the record before the Committee which supports or could support such a determination;

(g) On December 3, 1973, the plaintiffs appeared before a session of the defendant Committee presided over by a single Senator and were sworn, whereupon the following proceedings were had:

(i) the Committee denied plaintiffs' requests that a court reporter be present to make a record of proceedings before the Committee on which plaintiffs might seek this Court's determination of the legality of such proceedings;

(ii) the court reporter retained by plaintiffs for this purpose was excluded from the proceedings;

(iii) the Committee denied plaintiffs' requests that the proceedings on plaintiffs' objections be open to the public so that the public could be informed of plaintiffs' objections and the Committee's rulings thereon;

(iv) the Committee denied plaintiffs' requests that they be permitted to testify in public;

(v) the Committee denied plaintiffs' requests that they be interrogated as to the purported basis for requiring that they testify in secret so that the record would show whether there is any basis for the Committee's alleged determination that plaintiffs may lawfully be required to testify in secret;

(vi) the aforesaid denial was made over plaintiffs' representation that interrogation as to the basis for the Committee's resolution would show that there was no basis for the same and that it was, in fact, a fraud on the public; and

(vii) the Committee denied plaintiffs' requests that they be afforded an opportunity to make a prompt application to this Court for a judicial determination of their rights before they were compelled to surrender those rights under the threat of contempt sanctions.

6. Immediate temporary relief is necessary because the defendants are compelling plaintiffs, under threat of contempt sanctions, to testify in secret this very day and on successive days over the next week, thereby depriving them of their statutory and constitutional rights and subjecting them to continuing prejudicial publicity based upon distorted and speculative news reports of proceedings from which the press and the public are excluded. Unless defendants are temporarily restrained, plaintiffs' rights will be destroyed before the Court can hear and determine plaintiffs' motion for a preliminary injunction.

7. Such temporary relief will do no harm to the defendants because the defendant Committee will be perfectly

free to take plaintiffs' testimony in public at any time. Even if--contrary to what we believe to be the compelling position stated herein--the defendants should prevail in opposition to our motion for a preliminary injunction, they will have ample opportunity to proceed following the Court's determination of our motion. Indeed, any interrogation by the defendants will proceed much more expeditiously after there has been a judicial determination than it could possibly proceed now.

8. Temporary relief is clearly in the public interest. I am informed and believe that the defendant Committee was established to investigate the extent to which, in the words of its authorizing resolution, "illegal, improper, or unethical activities were engaged in by any persons" in the 1972 presidential election. In light of the background of this Committee's creation and purpose, I believe it is essential that the Committee's own proceedings not be infected with any activities of the kind that the Committee was created to investigate. I further believe that the memorandum of points and authorities submitted herewith shows, at a minimum, a probability that plaintiffs will succeed in showing that the proceedings of the defendant Committee in this matter are illegal, improper and violative of the controlling statute. It will serve the public interest to restrain any such proceedings pending a judicial determination of the propriety of the Committee's actions.

Moreover, the Chairman and Vice Chairman of the defendant Committee have stressed on the record the Committee's responsibility "to do the public's business in public view." The Committee's transcript of its hearings of June 5, 1973, relevant portions of which are attached hereto as Exhibit A, show

(a) that Senator Ervin emphasized " * * * the constitutional rights and obligations of the

Senate to inform the Congress and the American people of the truth in respect to the Watergate affair;"

(b) that Senator Baker stated that " * * *

I believe that a further responsibility inherent in the system of legislative hearings is the responsibility to do the public's business in public view."

Plaintiffs' application herein asks that the Committee do no less.

Information Voluntarily Furnished to the Committee.

9. During the past several months, my clients and I have voluntarily provided extensive and detailed information to the staff of the defendant Committee. For example, Mr. Ralph Winte was interviewed by the Committee staff on two separate occasions, once in Los Angeles on August 28, 1973 for four to five hours and once at his home in Las Vegas on August 30 for two to three hours. On the latter occasion the interviewers, Messrs. Lenzner and Armstrong of the Committee staff, served him with a subpoena with a ~~forthwith~~ return date.

10. Mr. Danner was interviewed by Messrs. Lenzner and Armstrong for approximately three hours on August 30, 1973. I am informed by Mr. Danner, and believe, (a) that Mr. Danner provided Messrs. Lenzner and Armstrong with copies of the transcript of an interview he had had with the Internal Revenue Service and an affidavit that he had provided to the Internal Revenue Service; (b) that Messrs. Lenzner and Armstrong asked extensive and detailed questions concerning the matters described in these documents, including political campaign activities; (c) that Mr. Danner answered their questions in detail; and (d) that, at the conclusion of the interview, Mr. Lenzner

served Mr. Danner with a subpoena with a ~~blank~~ return date and advised him that it was unlikely that any further testimony would be required of him but that such subpoena was being left as a formality.

11. On October 9, 1973 I appeared as counsel with an officer of Summa Corporation who provided answers to questions propounded by Messrs. Lenzner and Armstrong at the Committee's offices in Washington, D. C., for approximately five hours. A record was made of the questions propounded and answers given.

12. On October 10, 1973 I personally appeared before the Committee staff in Washington for more than five hours, during which time a record was made of the questions and my answers.

13. Following these extensive voluntary statements to the Committee staff, incomplete, distorted and speculative stories appeared in the press and other news media pertaining to the information which my clients and I had voluntarily provided to the staff of the defendant Committee. I was not the source of any such stories and I am informed and believe that my clients were not.

14. On November 6, 1973 I advised Mr. Lenzner of the Committee staff that my clients and I stood ready and willing to give our testimony to the Committee, but emphasized our position that our testimony should be taken at a public hearing as provided by law. I believed then--and I believe now--that such public hearings are imperative in view of the numerous and prejudicial "leaks" to the news media which have repeatedly followed the giving of testimony to the Committee in its "executive sessions" which are closed to the public and press.

15. Illustrative of the problem is the report in the New York Times, June 22, 1973, page 14, col. 1, which said in part:

The widespread leaks of Mr. Dean's five and one-half hour private testimony to the

Senate committee staff last Saturday have prompted concern among the committee members and forthcoming witnesses about the security of the closed-door sessions.

Senator Sam J. Ervin Jr., Democrat of North Carolina and chairman of the Watergate panel, said today that he knew of no way to guarantee that information obtained in the private sessions would not trickle into public print.

"I know of no way to stop men from talking," Mr. Ervin told reporters. "The only way men who have responsibility for keeping secrets can do so is by exercising will power, and if they refrain from using will power, then no one can force them to do so."

Senator Howard H. Baker Jr., the Tennessee Republican who is the vice chairman of the Watergate panel, reiterated today his concern that the news leaks might make it difficult to obtain information from future witnesses before they appeared in public.

16. On November 15, 1973, there were delivered to my office subpoenas ad testificandum and duces tecum addressed to Richard Danner, Carol Dunkle, Ralph Winte, Walter Glaeser, two addressed to Summa Corporation and one to me.

Requests that Testimony be Taken in Public and Denial of Same.

17. Following the receipt of the subpoenas, I reiterated plaintiffs' request to the Committee, through its counsel, Mr. Lenzner, that our testimony be at open and public hearings. The request was refused by Mr. Lenzner.

18. Accordingly, on November 18, 1973, I addressed a telegram to Senator Ervin, noting the extensive information already provided to the Committee, and emphasizing my clients' request that we be permitted to testify at a public hearing. Senator Ervin responded by telegram dated November 20, 1973 which threatened me and my clients with contempt of the Senate but failed to address my request for a public hearing. These telegrams are attached to the complaint as Exhibits A and B.

19. By telegram dated November 23, 1973, Mr. Lenzner stated that our request that our testimony be given in public had been denied. A copy of this telegram is attached to the complaint as Exhibit C.

20. By telegrams dated November 23 and 24, 1973, copies of which are attached to the complaint as Exhibits D and E, respectively, I again requested that I and my clients be permitted to testify at a public hearing. Notwithstanding the fact that my November 24 telegram requested that I be advised if my understanding that the matter was now ripe for judicial determination was erroneous, I received no reply to either of these telegrams.

The Filing of the Complaint and the Subsequent Resolution of the Committee.

21. Accordingly, on November 28, 1973, plaintiffs filed the complaint herein, complaining, inter alia, that they were being required to testify in secret sessions -- and threatened with contempt for failure to do so -- even though the Committee had never made a determination, as required by statute, that plaintiffs' testimony could lawfully be compelled in secret sessions.

22. Contemporaneously with, and subsequent to, the filing of the complaint, the defendants served additional subpoenas on plaintiffs Dunkle and Winte (November 28, 1973) and Glaeser and Davis (November 30, 1973).^{*/} Since the Committee had already announced on November 26 and 27, 1973 that it would not be conducting public hearings on the return dates of such subpoenas, it was clear that said subpoenas required that plaintiffs testify in secret.

23. Despite this requirement that plaintiffs testify in secret, the defendant Committee had never made any determination as required by 2 U.S.C. §190a-1(b) that secret testimony could lawfully be taken. This statute specifically requires that the testimony of a witness before a Senate Committee (including a Select Committee)

^{*/} At about the same time, the defendants served subpoenas on the other persons and entities described in the resolution referred to in paragraph 26 below. By stipulation of the parties, these persons and entities stand in the same position as if they were plaintiffs herein.

*** shall be taken in a public session unless the Committee determines the testimony to be taken at that hearing may relate to a matter of national security, may tend to reflect adversely on the character or reputation of the witness or any other individual or may divulge matters deemed confidential under other provisions of law or Government regulation * * *. [Emphasis supplied.]

24. On November 29, 1973, I met with the defendant Samuel Dash, Esq., counsel for the defendant Committee, and other members of the Committee staff, to reiterate plaintiffs' request that their testimony be taken in public. News accounts of this meeting, attributed to unidentified Committee sources, confirmed plaintiffs' belief that secret proceedings before the defendant Committee lead inexorably to distorted and prejudicial stories in the press. In the December 1, 1973 editions of the New York Times (the relevant portions of which are attached hereto as Exhibit B), an unidentified member of the Committee Staff was quoted as follows:

"If they're not hiding something, what are they scared of?" one investigator remarked today. "I think they are afraid that something more might come out, and we're trying to find out what that something is."

25. I submit that this process, by which plaintiffs' request that their testimony be taken in public is funneled through the defendant Committee and emerges as a story in the national press that plaintiffs are trying to hide information from the public, is support of the most compelling kind for the relief sought herein. Plaintiffs are entitled to have the press and the public judge for themselves whether it is the plaintiff-witnesses or the defendant-Committee that is trying to hide information from the public.

26. At about the same time that the Committee staff was leaking the above-described distortions to the press--and the press was being barred from proceedings before the defendant Committee--the Committee was seeking to provide retroactive justification for its precipitous actions. On the same day that I met with Mr. Dash, November 29, 1973, the Committee--at what the Washington Star-News described as a "hastily called executive session"--adopted a resolution purporting to make a blanket determination that the evidence of each and every one of sixteen Summa witnesses or entities met all three of the statutory prerequisites--including so-called "national security"--for compelling evidence in secret. A copy of this resolution is attached hereto as Exhibit C. The Star-News story is Exhibit D.

27. I respectfully submit that this resolution is, on its face, an example of precisely the kind of "illegal, improper or unethical activity"--ostensibly justified by sweeping and unsupported claims of so-called "national security"--that the defendant Committee was created to investigate. I believe that the attached memorandum of points and authorities makes clear that the applicable decisions, including recent decisions of the Court of Appeals for this Circuit, require that the "determination" specified in the statute be made on the basis of facts appearing in the record and that the witnesses be apprised of the basis for such determination. As appears from the face of the resolution, it is not based upon any facts--whether of record or otherwise--but only upon the Committee's totally unsupported "expectations" as to what the Committee "normally" receives as evidence and what such evidence "tends generally" to show.

The Committee's Rulings of December 3, 1973

28. On December 3, 1973, my clients and I appeared and were sworn before a session of the defendant Committee presided over by a single Senator. Although my requests for a transcript

of these proceedings was initially denied, a transcript was provided late yesterday, thus, at last, enabling me to present the matter to the Court for its determination. A copy of this transcript is attached hereto as Exhibit E.

29. As shown at pages 6 and 7 of the attached transcript ("TR."), I requested that plaintiffs' objections to the defendants' proceedings be heard and determined at a public rather than a secret proceeding, pointing out (a) that the Committee's resolution concerning testimony could hardly apply to procedural objections and (b) that, in view of the prejudicial leaks concerning the nature and purpose of my clients' objections, the continuing irreparable injury to me and my clients could be alleviated only by allowing the public and the press to have access to the proceedings at which plaintiffs' objections were presented and ruled upon. This request was denied. (TR. 8-9)

30. In view of the fact that I and Messrs. Danner and Winte had already been interrogated extensively by the Committee Staff--and, I submit, there is nothing whatever in those interviews to support the purported determination that our testimony can lawfully be taken in secret--I requested that the Committee interrogate other witnesses to satisfy itself that there was absolutely no basis for the purported determination that such witnesses could be compelled to testify in secret. In fact, I submitted to the Committee that interrogation of these witnesses for this limited purpose would show that the Committee's purported determination is a fraud on the public. (Exhibit F) This request was denied. (TR. 31) I respectfully suggest that the interrogation of Mr. Gribben which was conducted under protest and threat of contempt sanctions yesterday shows conclusively that the purported determination on which the threats of contempt were based is totally without support and is, indeed, a fraud on the public. The Committee has advised that the transcript of this

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proceeding will be available this morning. I will furnish the Court with a copy as soon as possible.

31. On December 3, 1973, the Committee formally denied plaintiff's repeated objections to testifying at secret hearings (e.g. TR 29-30) and denied our request that we be permitted to move promptly the next day for a judicial determination of the propriety of the Committee's rulings before being compelled--under threat of contempt sanctions--to comply with those rulings (e.g. TR. 27).

32. Accordingly--and with no other alternative--certain of the Summa witnesses complied with the Committee's rulings under protest until such time as I could obtain a transcript of the Committee's rulings and apply to this Court for temporary relief. Having obtained a transcript yesterday evening, I am now able to apply--and do respectfully apply for immediate relief from the continuing irreparable injury to the plaintiffs which is being caused by the defendants refusal--contrary to plaintiff's rights and the controlling statute--to permit the plaintiffs to testify in full view of the public.


Chester C. Davis

Subscribed and sworn to before me
this 5 day of December, 1973.


Margaret D. Fletcher
Notary Public

My Commission Expires:

My Commission Expires Nov. 14, 1974

2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al., :
Plaintiffs, :
v. : Civil Action No. 2107-73

THE SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES,
et al.,
Defendants.

Defendants.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 4
U.S. Courthouse
Washington, D.C.
Wednesday, December 5, 1973

The above-entitled matter came on for hearing in open court on Application for Temporary Restraining Order at 10:34 o'clock a.m., before THE HONORABLE AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

CHESTER C. DAVIS, ESQ.,
DAVID S. DUBIN, ESQ., and
LAWRENCE BURSTEIN, ESQ.,
appearing on behalf of plaintiffs.

JAMES HAMILTON, ESQ., and
RONALD ROTUNDA, ESQ.,
appearing on behalf of defendants.

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EUGENE T. FEDORATION
Official Court Reporter
6804 U. S. Courthouse
Washington, D.C. 20001

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Civil Action 2107-73, Richard
3 Danner, et al, versus Senate Select Committee, et al.

4 MR. DAVIS: If Your Honor please, may I introduce
5 myself as Chester Davis. I am counsel for the plaintiffs in
6 this action. I understand from Mr. Barse that Your Honor
7 will hear me even though I have not been formally admitted to
8 this Court for the purposes of this case.

9 THE COURT: Yes, I will, Mr. Davis, through the
10 representation of Mr. Barse who is known to the Court as a
11 practicing attorney and who has endorsed the pleadings that
12 have been filed in this case as local counsel.

13 MR. DAVIS: At this point, Your Honor, I would like
14 to try to find words to express my appreciation for your hearing
15 me and particularly for your indulgence in my being late
16 getting here. It has been a rugged couple of days that I have
17 had in Washington at the invitation of the Senate Subcommittee
18 the defendants here.

19 I must apologize again for the short time that we
20 have given the Court for an opportunity to look over the
21 papers that we just filed. I think that I should explain to
22 the Court that perhaps through inadvertence, I don't know,
23 but when I was finally given an opportunity to appear before
24 a senator to present my objections to the procedures that were
25 being followed, I had understood that -- and after the reporter

1 that I produced was required to leave the session -- I was
2 informed, as I understood by Senator Ervin, and I believe he
3 intended the same thing because yesterday he made it clear
4 that what he thought he had ordered was that I would be made
5 available a copy of the transcript of that proceeding so that
6 I would be in a position of presenting my papers to the Court
7 on the basis of the transcript of the rulings rather than
8 having to rely on my recollection by affidavit.

9 THE COURT: Would you like to come to the rostrum,
10 Mr. Davis? Or it is perfectly all right, whichever suits you,
11 I have no objection.

12 MR. DAVIS: If the Court hears me well enough --

13 THE COURT: I hear you well enough. I just wanted
14 to know. You are free to use the rostrum if you would like.

15 MR. DAVIS: Somehow or the other, either the staff
16 misunderstood the instruction of the Chairman of the Committee.
17 Be that as it may, I was not furnished a copy of the transcript.

18 We subsequently had, first, another hearing. This
19 time before Senator Weicker, with one of the witnesses under
20 protest, but I was intending to comply with the rulings of the
21 Committee until I had an opportunity to come to court. That
22 transcript was ordered to be made available to me. I haven't
23 got it yet, but I understand that it is on its way now.

24 These preliminary remarks, Your Honor, are merely
25 to explain the handicap we have had in presenting to the Court

1 our position, which basically is this:

2 Quite apart from whatever procedures are being
3 followed contrary to the rules of procedure which the Committee
4 adopted pursuant to the enabling legislation, leaving
5 aside the possible power that the Committee has to construe
6 its own rules in a manner which is inconsistent with the rules
7 themselves, issues which could very well become germane in a
8 contempt proceeding or in an attempt to punish a witness for
9 failure to comply with whatever may be required of the witness
10 or anyone else, when the Subcommittee does not follow its own
11 rules, for the purpose of this application, Your Honor, and
12 I am primarily relying on a statutory provision which I
13 respectfully submit requires the Subcommittee or any member
14 thereof, like any other member of the public, to comply with
15 the laws of the Congress, and I cannot frankly follow the
16 reasoning of the defendants that somehow or another because
17 they are a committee or subcommittee of senators, and with
18 all the respect that we all have -- I certainly have -- for
19 all those senators, I do not understand the law to be that
20 they are exempt from the statutory provisions of the Congress
21 which deal specifically with the rights of individuals to
22 have an open and public hearing for the safeguards which I
23 don't think is necessary for me to elaborate upon.

24 From my point of view, whether it is a senator, a
25 committee of senators or a policeman on the beat, if he is in

1 the process of ignoring the clear statutory requirements of
2 Congress, the Court in my judgment is the place where that
3 question is to be determined and relief granted. I do not
4 understand the arguments advanced to me, primarily by the
5 staff, that somehow or another they and only they are in a
6 position to determine when or if anyone is to be given an
7 opportunity to be heard in public.

8 My first objection to the procedure to which I was
9 subjected is that I thought that at least my objections to
10 their procedures could be heard in public. I was denied that.

11 If Your Honor please, at this point I would like to
12 pause and comment on the effect of that, that the press in
13 articles which appear in the press have on parties that are
14 subpoenaed or appear before this Subcommittee.

15 The vice in the procedure that is being followed in
16 certain instances and which is particularly applicable to our
17 circumstances, which are not necessarily the same as all the
18 circumstances applicable when other parties are required to
19 appear before the Senate, because in sort of an indirect way,
20 Mr. Hughes, who is the sole stockholder of Summa Corporation,
21 seems to attract a great deal of interest in the press when-
22 ever his name is mentioned. There is a particular climate
23 where the press is inclined to speculate if given the slightest
24 opportunity to speculate.

25 It is also a fact which is provable, whether we like

1 it or not, and without suggesting in any way that any
2 particular person or group of persons are responsible for it
3 or are deliberate about it, the fact is that there are leaks,
4 that there are statements made, representations made by the
5 staff to the press which then distorts the situation.

6 As for example, it is absolutely true that we want
7 to tell the Subcommittee everything we know. We want to avoid
8 the possibility of any suggestion that we failed to cooperate
9 fully in presenting all the evidence available to us.

10 But what is it that has appeared in the press? That
11 I am engaged in tactics to delay the investigation of the
12 staff; that we appear and testify reluctantly only because
13 we are being threatened with contempt citations.

14 That, Your Honor, is doing us irreparable injury.
15 More than that, and from a legal point of view and from a
16 lawyer's point of view and from my point of view in particular,
17 the damage being done is quite serious.

18 Summa Corporation and its various employees, includ-
19 ing those who have been called to appear here, are involved,
20 first of all, in very serious litigation in the federal courts
21 in California and in Utah. To a large extent, that litigation
22 involves issues of fact, transactions which took place -- I
23 can say on the record here -- involving Mr. Maheu and the
24 manner in which he handled certain funds belonging to Mr.
25 Hughes and to the corporation, part of which funds found their

1 way into illegal contributions and an account which is being
2 accounted.

3 Leaving that aside for a moment, the IRS has shown,
4 properly so, a great deal of interest in a number of the
5 transactions. As early as 1971, I myself under oath testified
6 before the IRS. So has Mr. Danner and so has a number of
7 other people. But that testimony and the facts there revealed
8 and the manner in which we revealed those facts are secret.
9 Somehow or another, some branches of the government are able
10 to obtain that information, because I know for a fact person-
11 ally that the SEC obtained transcripts -- they tell me
12 properly, and I don't doubt it -- of those IRS proceedings.

13 The next thing we are confronted with is an investi-
14 gation by the Securities and Exchange Commission at which
15 again those same people are interviewed, are required to
16 appear in private. I call them secret sessions. They are
17 put under oath, testify, and are put through rigorous cross-
18 examination, asked questions, because they are those kinds
19 of proceedings which inevitably go into suggested facts and
20 thoughts into the witness' mind, and the witness scrambles
21 around trying to explain whatever it is that is being given
22 to him.

23 All those transactions have also been described in
24 depositions which were filed in the federal courts in Cali-
25 fornia, and that document became public. But in that deposition,

1 naturally, all the truth is not there. Depositions are not
2 designed necessarily to try to establish the truth during the
3 course of the deposition. But the public has access to that
4 one.

5 Then we come to the Senate Committee. Oh, the
6 Special Prosecutor's office, they have interviewed all of us,
7 all of these very same people. Those interviews, of course,
8 have not been made public.

9 Now we come to this Senate Committee and all the
10 publicity that its activities attracts. And this is important,
11 Your Honor. They know the area in which these witnesses have
12 some knowledge. They know it because I know for a fact that
13 they were given at least the depositions that were taken in
14 this litigation which described these very same transactions.
15 Their staff interviewed Mr. Danner on either two or three
16 occasions. The exact facts, I think they are in my affidavit.
17 So was Mr. Winte. So was I.

18 On some of them I appeared with the person being
19 interviewed originally as set. I didn't need to appear. You
20 want to interview to find out what they know? Go ask them.
21 And they did. And they too have a transcript of those
22 proceedings because those interviews are in question and
23 answer form.

24 Then I was interviewed for five hours one evening.
25 Again this business of not -- they wouldn't furnish me with a

1 transcript, but at that time I was allowed to have my own
2 reporter, so I do have --- not with me today, though -- the
3 results of that interview.

4 But I can represent to this Court that during the
5 course of the interview I told them everything I know, and
6 so far as I am concerned, what they were told, whether the
7 person was under oath or not under oath, was the truth.

8 But be that as it may, the point I am trying to
9 make is merely that they cannot claim that they needed an
10 executive or secret session in order to try to find out what
11 it is or the areas in which we might have some knowledge or
12 information. Although, so far as I am concerned, it isn't a
13 question of what the rules of procedure provide in that regard.
14 It is what the statute provides.

15 So, what did they do? When in response to those
16 various subpoenas which I received, and I promptly sent tele-
17 grams saying I would like an opportunity to be heard on my
18 objection to non-public hearings because I have been seeking
19 an opportunity where, whatever it is, that we know whatever
20 it is we testified to, be told in a forum where the press or
21 whoever is interested may make up their own mind as to who is
22 telling the truth, who is lying and then comment on it, however
23 fairly or unfairly they want to. At least at that point my
24 clients will have an opportunity to make appropriate comments
25 to the press.

1 I don't want to get into a battle of press inter-
2 views where they give one interview and I give one interview
3 and nobody knows what the facts are.

4 But the point I started to address myself to and I
5 don't think I quite finished, Your Honor, is when a witness
6 is subjected to those several, numerous and repeated inter-
7 rogations, you end up by destroying the witness in the sense
8 that the next time he appears, if they ever decide to ever
9 let us tell our story in public, the witness is confused
10 between trying to reconcile prior statements. He can be
11 badgered by an interrogator. And at that point the ability
12 of any human person -- I know it is mine. At the moment I
13 have more difficulty in trying to separate what it is that I
14 did at a particular time or said at a particular time and
15 trying to remember what it is that I was told in connection
16 with something that took place during an examination or what-
17 ever may happen.

18 So far as I am personally concerned, I think I am
19 able to deal with that kind of a problem. I submit to Your
20 Honor that the average witness is not. And if we are ever
21 going to have an opportunity of telling our story, I think it
22 ought to be told in public pursuant to the requirements of the
23 statute.

24 Now, the statute has an exception to it. It says
25 that if something of national security is involved or if it

1 may reflect adversely on the character or reputation --

2 THE COURT: I am familiar with the statute.

3 MR. DAVIS: I think that statutory provision, apart
4 from the national security, was designed to protect a witness
5 but it does say "and others."

6 So, what happens? After the staff of the Committee
7 received my telegrams, they refused me a hearing. I then have
8 a conference with them and I say, well, I am not particularly
9 well versed in your rules of procedure. I don't understand
10 how you operate in this arena. All I want is an opportunity
11 to be heard on my objections.

12 They say, well, the only time you can be heard on
13 your objection is when you produce the witnesses to testify.
14 I said, but my objection is I do not want the witness to
15 appear to testify in a secret hearing. That is the thing I
16 want to be heard on.

17 Sorry, Mr. Davis, the only way you could do that is
18 by attending with your witness.

19 That is most peculiar to me. In order to get a
20 determination that I am not required to attend, I must attend.

21 The burdensomeness, the oppressiveness as in fact
22 took place in the press of appearing, and then the suggestions
23 of the press that we are refusing to testify when that isn't
24 the case. My objection was never to refuse to testify. Mine
25 was a request which I think was a reasonable request, that I

1 be permitted to testify openly. But that is what the press
2 reports in this conference with the staff and its counsel.

3 I then suggested a procedure -- oh, I filed a
4 complaint in court. They said, well, we don't pay attention
5 to complaints in court. First of all, we have got 60 days
6 to answer. Secondly, there is a separation of powers and the
7 courts cannot interfere with the Senate and its proceedings.

8 I said no, but my understanding is it is the
9 function of the court to construe and apply the law as reflected
10 by the statute, as reflected by the common law, as required
11 by the constitution.

12 THE COURT: Well, I don't think anyone argues that.
13 That is not the issue here. The issue here is at what point
14 it becomes the responsibility of the court to construe a
15 statute; not whether it is not the ultimate determiner of the
16 law. At what point is the issue in this case, Mr. Davis.
17 That is what we are here to address ourselves to this morning.
18 I have read all the papers that have been filed in this case,
19 so I know what your efforts have been. So, I think we ought --

20 MR. DAVIS: I suggest, Your Honor, that the right
21 of a party to be heard in court should not occur after the
22 damage has been done when relief cannot be granted, and I
23 not
24 humbly submit also that it should be under the circumstances
25 where the person who is merely attempting to establish what
his rights are should be required to do so under the threat

1 of a contempt of the Senate.

2 Now, it is true that most of your cases with respect
3 to contempt of the Senate have occurred in situations where
4 the witness refused to answer a particular question on the
5 advice of counsel or otherwise claiming the Fifth or some
6 other constitutional protection.

7 But whereas here the issue is whether the holding of
8 the executive session itself under these circumstances
9 violates the statute now, I humbly submit that the question
10 is ripe for judicial interpretation and judicial decision.

11 Now, the transcript which is missing, which I would
12 submit to the Court will establish beyond a doubt that the
13 attempt to comply with the statute belatedly made on November
14 29th after this conference I was referring to, is a fraud and
15 a sham. There is no conceivable basis for suggesting that the
16 people listed in this resolution come within the exception
17 of the statute.

18 And the testimony given by Mr. Gribben yesterday
19 morning when Mr. Weicker was acting as a quorum of one -- I
20 don't want to go into at this time how I understand their
21 rules to get a quorum of one to pass upon objections to
22 procedure and testimony and then they say that a majority of
23 the Committee makes the decision.

24 But that area, I think, is one where, as Your Honor
25 quite correctly points out, that perhaps is not ripe for

1 judicial review at this time because the functioning of the
2 Senate Subcommittee in that area may be regarded as something
3 that is internal to them.

4 But I do respectfully submit and I would like to
5 hand to the Court the transcript of yesterday's proceedings
6 relating to David Gribben, one of the persons identified in
7 this resolution. I represent to the Court that a comparable
8 situation exists with respect to the others, that now is the
9 time to determine whether the cop on the beat is hitting some-
10 one over the head unlawfully, and not after it has occurred.
11 And the harm that is being done to me and my clients will be
12 aggravated, particularly when Mr. Danner is to be heard for
13 the third, fourth or fifth time by this Committee under
14 circumstances whereby this \$100,000 was delivered to Mr.
15 Rebozo. If that is not held in a public hearing where the
16 public can determine for themselves whether or not Mr. Danner
17 is or is not telling the truth, because what then happens is
18 that there are innuendos that somehow or other that money was
19 given for the purpose of bribing some officials; sometimes
20 they say in connection with the acquisitions out west; some-
21 times in connection with rulings --

22 THE COURT: Mr. Davis, this Court knows of no edict
23 ever laid down by any court which has suggested to anybody,
24 legislative or otherwise, how it should conduct its affairs
25 in order to appeal to a public jury. Now, you are suggesting

1 that the Court has authority to fashion orders and issue
2 declarations and judgments advising that somehow or other
3 the procedure must be one that permits there to be some
4 national jury to make up its determination on matters that
5 lie within the province of a legislative committee.

6 MR. DAVIS: I'm sorry, Your Honor. I think I have
7 confused the point I was trying to make. I was addressing
8 myself to the irreparable injury for failure to comply with
9 the statutory provisions.

10 In so far as the power of the court is concerned,
11 obviously it does not -- the power of the Court does not rest
12 upon whether or not the public does whatever it does. The
13 power of the Court, I submit, rests in requiring compliance
14 with a statute of the Congress which establishes the right
15 of the plaintiffs to testify only at a public hearing.

16 THE COURT: Well, can you direct the Court's
17 attention to any judicial precedent in that regard?

18 MR. DAVIS: Your Honor, with the amount of time I
19 have had to prepare, I am afraid I cannot directly answer
20 your question, other than to refer to the cases in our
21 memorandum of law which is annexed at the end of our motion
22 papers, I suppose. I don't know of a case exactly in point
23 to our situation. I can refer the Court, of course, to
24 statements made by the Supreme Court, clearly indicating to
25 me at least that star chamber proceedings, as I call it, or

1 secret inquisitions, violate the constitutional rights of a
2 party.

3 I am not referring to the right of the witness not
4 to answer a particular question. I am referring to the right
5 of a witness not to be subjected to star chamber proceedings.

6 THE COURT: And, of course, he doesn't have to be
7 for the simple reason that a witness need not appear. Isn't
8 that correct?

9 MR. DAVIS: At the risk and peril, as they threat-
10 ened me yesterday, of having a sergeant-at-arms of the Senate
11 take him and put him in custody.

12 THE COURT: Yes.

13 MR. DAVIS: That, I submit, Your Honor, is not much
14 different than having a policeman on the beat say you do what
15 I tell you or I will hit you over the head. It is clearly
16 unlawful. What do you do if the Court does not say, Mr.
17 Policeman, stop. Show me your right to hit that man over the
18 head first.

19 I cannot believe that the courts are powerless to
20 sit by and watch somebody deliberately flouting a statutory
21 provision just because it is the Senate that is doing it.

22 THE COURT: Well, do you suggest that it makes no
23 difference that this is a Senatorial inquiry?

24 MR. DAVIS: Absolutely none. Everybody has got to
25 comply with the statutes of the Congress.

1 THE COURT: Well, then the cases say to the
2 contrary, don't they, with respect to -- considerations are
3 involved when there is a senatorial committee duly constituted
4 operating that are not involved in other investigations. As
5 for example, your reference to the SEC investigation. But be
6 that as I may --

7 MR. DAVIS: That's quite true, Your Honor, but I
8 think the statute I am referring to specifically refers and
9 addresses itself to senatorial investigations. That is my
10 point. I think that the statute to which I am referring the
11 Court specifically addresses itself to this problem, and there
12 is nothing in the enabling resolution or any other act of
13 Congress which says that that statute is to be ignored; that
14 whenever the Committee adopts rules or makes determinations
15 of its own that they can ignore the statute.

16 Yes, I do recognize that the SEC has certain inves-
17 tigative powers pursuant to statute. But the action of this
18 Committee is pursuant to this very statute and the enabling
19 resolution which identifies the area in which this Subcommittee
20 may function. But there is nothing in the resolution of the
21 Senate that says that this statute is to be ignored. And
22 so far as I am concerned, it is the law, and when the law is
23 being violated or threatened to be violated, it is my under-
24 standing that a party goes to court for the purpose of getting
25 relief. If I don't come to court, where do I go?

1 In essence, Your Honor, I think I have said every-
2 thing that might be persuasive.

3 THE COURT: Let me hear what the Senate Committee's
4 Counsel has to say.

5 MR. HAMILTON: May it please the Court, my name is
6 James Hamilton and I am Assistant Chief Counsel for the
7 Senate Select Committee on Presidential Campaign Activities.

8 I wish to apologize for the state of my voice this
9 morning. At least it will assure that my argument will be
10 very brief.

11 As I read the plaintiffs' complaint, Your Honor,
12 they seek essentially three things. First, that an injunction
13 against public hearings be entered before the determination
14 under this section of the statute, 2 USC 198-1B is made.

15 Secondly, that this Court enter an injunction
16 against the Committee compelling compliance with its subpoenas
17 until plaintiffs have had a hearing and determination on
18 their objections to these subpoenas.

19 Thirdly, as I read the complaint, it asks for an
20 injunction against initiation of contempt proceedings by the
21 Committee until plaintiffs have had a hearing and determina-
22 tion on their subpoenas and the objections to their subpoenas.

23 Now, it seems to me that the request for the TRO
24 that has been put in this morning goes even beyond the prayer
25 of the complaint. As I read the TRO, it asks the Court to

1 require that there be a public hearing rather than a private
2 hearing, and it asks the Court to enjoin the Committee from
3 initiating contempt proceedings by reason of the plaintiffs'
4 failure to appear and give evidence in private.

5 So, the TRO request exceeds even the rather sweeping
6 request in the complaint.

7 Be that as it may, Your Honor, we would oppose the
8 TRO and preliminary injunction request. There are two motions
9 before the Court that the plaintiff is putting in, and if I
10 might, Your Honor, I would also like to --

11 THE COURT: Well, let me interrupt you, if I may,
12 for a moment. I am not hearing a motion for preliminary
13 injunction at this point. I am hearing a motion for temporary
14 restraining order. I think that should be made perfectly
15 clear.

16 MR. HAMILTON: Well, I am glad that is clear, Your
17 Honor, because if you notice in the papers there are two
18 motions before the Court; one for temporary restraining order
19 and the other one for preliminary injunction.

20 THE COURT: Well, I have served on me an application
21 for a temporary restraining order, that is, I have filed an
22 application for a temporary restraining order. I'm sorry,
23 motion for preliminary injunction supported by the affidavit
24 of Mr. Davis.

25 MR. HAMILTON: Yes, Your Honor. I have no real

1 objection to speaking to both motions. In fact, Your Honor,
2 if it is appropriate, I would like to make a speaking motion
3 to dismiss this case because I don't think that either the
4 Court or the Committee should have to trifle with this case
5 longer than today, and I can present papers within 24 hours
6 on our motion to dismiss, if the Court so desires.

7 THE COURT: Well, I grant you leave to file your
8 motion to dismiss. You really don't need leave, but you may
9 file your motion to dismiss. But I will neither hear nor
10 determine the motion to dismiss the complaint until I have
11 received your papers and until the plaintiffs have had an
12 opportunity to reply.

13 Were you arguing, Mr. Davis, in conjunction with
14 both the temporary restraining order and the motion for
15 preliminary injunction?

16 MR. DAVIS: No, Your Honor, I am merely trying to
17 stop the clock until the Court --

18 THE COURT: I have not had the opportunity to do the
19 research that I think would be appropriate for a motion for
20 preliminary injunction. I don't have the time available at
21 this juncture for a motion for preliminary injunction. This
22 is why I indicated that I would hear the TRO on short notice,
23 and although the preliminary injunction application has been
24 made, I do not intend to hear that this morning.

25 MR. HAMILTON: Well, with Your Honor's permission,

1 I would like to say very briefly a few words about the merits
2 of this case and why we think the case should be dismissed,
3 because I do think that what I have to say is relevant to
4 Your Honor's determination on the temporary restraining order.

5 I would like to make two basic points about this
6 lawsuit.

7 The first is, Your Honor, that it appears to us to
8 be an effort to delay and disrupt the Committee's hearings.
9 It is the Committee's view that further evidence from these
10 plaintiffs is needed. As the plaintiffs well know and as I
11 am sure the Court will recognize, no productive investigation
12 of sensitive matters can be conducted in the glare of public
13 scrutiny. There is no better prescription for making leads
14 dry up, witnesses become silent, prospective witnesses
15 unavailable, than to conduct a totally public session.

16 Moreover, we think it would be foolish to call a
17 witness in public session without having a very full knowledge
18 of what this witness is going to say. I think recent history
19 has demonstrated that the Committee is certainly not afraid of
20 public hearings. But we want any public hearings we have to
21 be fruitful and meaningful hearings rather than mere explor-
22 ations of what a witness might have to say.

23 Secondly, Your Honor, the second point I would make
24 is that we feel that this lawsuit is entirely spurious. First
25 of all, this suit is barred by the Speech and Debate Clause

1 of the Constitution, a provision that is not even mentioned
2 in plaintiffs' papers if my hurried reading this morning has
3 properly informed me.

4 Plaintiffs do not seem to dispute in their papers
5 that defendants in seeking private hearings and in seeking
6 compliance with the Committee's subpoenas are pursuing valid
7 legislative duties, but the plaintiffs also fail to realize
8 that these defendants are protected in the exercise of these
9 duties by the Speech and Debate Clause.

10 If I might cite the wellknown Gravell case. It is
11 found at 408 U.S. 367. This is a case that makes clear that
12 committee work like the work of the Select Committee is within
13 the sphere of legitimate legislative activity that is
14 protected from suit by the Speech and Debate Clause, and that
15 case prevailed. Also, the case of Doe v. McMillan makes it
16 very clear that even the activities of congressional aides
17 are protected from suit as long as these aides are assisting
18 congressmen in performing valid legislative duties. Now,
19 the Doe case is found at 93 Sup. Ct. 2018.

20 I would also call the Court's attention to the
21 recent decision of this court, Judge Green, in National
22 Citizens Committee for Fairness to the President versus Senate
23 Select Committee on Presidential Campaign Activities, the same
24 defendant as is before the Court here.

25 In this case the plaintiffs sought to prohibit

1 public hearings and this case was dismissed by Judge Green
2 in part on Speech and Debate Clause reasons.

3 I think these cases demonstrate that this suit really
4 should not be before this Court, and as the Court said to
5 Mr. Davis, there is no decision, certainly no decision that
6 we know about where a court has allowed tampering with the
7 legislative hearing and investigation in the way that Mr.
8 Davis proposes to do so by his lawsuit.

9 Now, there is another reason that I think that --

10 THE COURT: What a lawsuit is all about, you have
11 got rules and regulations, and you have got a statute. Follow
12 it and you have no problems. And the request that is made to
13 the Court by this plaintiff, well, they have asked for
14 injunctive relief. But the impropriety of injunctive relief
15 has been rather clearly stated in all of the courts of record
16 that this court has read with the single exception of United
17 States Serviceman's Fund, Inc. v. Eastman. That is the only
18 case that this Court is acquainted with where there was a
19 temporary stay, a preliminary stay by the appellate court to
20 give that court an opportunity to resolve --

21 MR. HAMILTON: Well, may I -- I'm sorry, Your Honor

22 THE COURT: -- it. And this is why I say to you,
23 as I have said to Mr. Davis in his argument, the question is
24 not whether or not the matter here presented is to be ultimately
25 resolved by a court, because clearly they are. The courts

1 have said that these very issues are justiciable, and the
2 courts have said that when they are properly presented to a
3 court there can be relief.

4 But here again, the courts have never given
5 injunctive relief. They have given declaratory relief. The
6 Supreme Court has been very careful about saying that there
7 is no instance in which it is not clear that the ability to
8 fashion adequate relief would extend greater than declarative
9 relief in this instance, again because we are dealing with a
10 coordinate body of the government.

11 MR. HAMILTON: If I may, Your Honor, I would like
12 to suggest a distinction in the Serviceman's case. In that
13 case --

14 THE COURT: Oh, there is a distinction. It is
15 distinct on the facts, and it is that factual distinction
16 that does not make the Serviceman's case applicable to the
17 fact situation here.

18 It was very clear in that case that the appellate
19 court was concerned about the fact that there was no other way
20 for the individuals whose rights were threatened to protect
21 their rights because the subpoena was issued to a third party.
22 It was to the bank that the subpoena was issued, as against
23 to the parties in this instance who are asserting a violation
24 of their constitutional rights. That is a different kettle
25 of fish, if I may use that phrase. It is not this case.

1 This case much more closely follows the kind of
2 issues presented in Ansara, for example, and Sanders, cases
3 of this jurisdiction, both of which are persuasive authori-
4 ties to this Court that I have no right to issue a temporary
5 restraining order. It would take much discussion, legal
6 discussion, not factual allegations but much legal discussion
7 to persuade the Court on a hearing on preliminary injunction
8 that even preliminary injunctive relief could be established.

9 But I am going to give plaintiffs that opportunity.
10 As I have indicated, I will set a hearing on the motion for
11 preliminary injunction.

12 Let's see, I will have to have my book. If you want
13 to be heard, if you think there is anything that can be added
14 by oral argument on your motion for preliminary injunction,
15 Mr. Davis, I will hear you. Otherwise I will decide the
16 motion on your submission and I will give you such additional
17 time as you think is necessary to submit formally --

18 MR. DAVIS: I would appreciate an opportunity of
19 very briefly pointing out that our complaint, of course, does
20 ask for a declaratory order also. I don't know that in the
21 heat of preparing these papers we also asked for an immediate
22 order. I would like to point out what I think is a distinction
23 between the cases which are obviously concerning and disturbing
24 Your Honor.

25 THE COURT: Oh, I will give you the opportunity if

1 you wish to respond to Mr. Hamilton. But I interrupted
2 Mr. Hamilton, and if he wishes to complete his argument, he
3 certainly may do so.

4 MR. HAMILTON: Your Honor, considering the state of
5 my voice and considering the fact that I understood Your Honor
6 to be ruling —

7 THE COURT: I am ruling on the temporary restraining
8 order, but I will let the record be made so there is no
9 question about the Court's position on the temporary restraining
10 order. This is why, if you wish to have additional
11 matters put into the record, I will give you the opportunity
12 at this juncture, or you may submit anything in writing.

13 MR. HAMILTON: Well, Your Honor, I think I would
14 like to say just for the record, and I hate to burden Your
15 Honor with any further argument, especially with my voice
16 sounding like it does.

17 But I would like to say two things very, very briefly.

18 First of all, the plaintiffs do rely on this statute
19 that Your Honor says he has read. Now, in connection with
20 this statute, the Committee last week made a good faith
21 determination that because of the reasons or the requirements
22 of this statute, the hearings of these individuals should be
23 conducted in private. This resolution, which I will not read,
24 is connected to plaintiffs' affidavit as Exhibit C.

25 Now, this resolution was based upon representations

1 to the committee by the staff that there were numerous areas
2 into which inquiry would be made of the plaintiffs that might
3 tend in some way to defame them or others. As Your Honor
4 realizes, this is a highly volatile area and the chances of
5 defamation are high.

6 Secondly, on this national security matter, Your
7 Honor, I don't want to go into this in a great deal of detail,
8 but I would like to say that it is based upon information we
9 have received emanating from a White House source that inquiry
10 into the affairs of Donald Nixon would involve national
11 security issues.

12 So, my point simply is, Your Honor, that this
13 determination which is made pursuant to the statute is a good
14 faith determination based upon representations by the staff.

15 I would also like to make sure that it is on the
16 record that the plaintiffs have had full opportunity to object
17 to compliance with the subpoenas; have had or will have full
18 opportunity. They have already raised their full objection
19 before Senator Ervin in regard to testifying in private session
20 pursuant to the subpoenas ad testificandum, and all plaintiffs
21 have had or will have the opportunity before a senator to
22 raise all objections they may have regarding subpoenas ducches
23 tecum.

24 In the event that any plaintiff fails to testify or
25 to produce materials pursuant to any subpoena, he will have

1 the full opportunity before the entire Committee to present
2 his objections to these subpoenas before the Committee decides
3 to initiate contempt proceedings against them.

4 Now, if Your Honor desires me to go further and
5 make some representations regarding the motion for preliminary
6 injunction which Your Honor may decide on the papers, I would
7 like to say this.

8 There are several standards regarding the motion
9 for preliminary injunction that I feel the plaintiffs cannot
10 meet. First of all, before a preliminary injunction can be
11 granted, it is clear from the cases that the plaintiffs must
12 demonstrate that they have a reasonable chance of success.
13 And I think the comments that I have just made about the Speech
14 and Debate Clause and about the hearings that are being given
15 by the Committee to the plaintiffs demonstrate that they have
16 no chance of success in this case. Consequently, the motion
17 for preliminary injunction must fail.

18 Secondly, even if their prospects were a bit more
19 sanguine in regard to ultimate success, I think that the
20 preliminary injunction motion must fail because they cannot
21 show irreparable harm.

22 Now, the rules of the Committee, Rule 27, do promise
23 secrecy for materials taken in private session, and despite
24 the fact that there has been information appearing in the
25 papers, these rules -- we attempt to live up to these rules,

1 and Senator Ervin said the other day to Mr. Davis that in
2 this matter, because we realize its volatility, the Committee
3 will take exceptional steps to insure that the material and
4 evidence taken from the plaintiffs is in no way leaked to the
5 press.

6 Now, I think that the plaintiffs can hardly claim
7 irreparable harm on the basis that they have not had an
8 opportunity to present their objections to the Committee
9 because their objections have been or will be presented to the
10 Committee and they will be given full opportunity to be heard.

11 As the Court knows, in viewing the irreparable harm
12 to the plaintiffs on a preliminary injunction, the Court must
13 also balance in or examine the harm to defendants if the
14 preliminary relief is granted. In this case I think the harm
15 to the defendants, to the Committee, would be substantial.
16 Our mandate runs out on the 28th of February. We are trying
17 very hard to do a thorough investigation of the so-called
18 Hughes-Rebozo matter so we can put on meaningful, fruitful,
19 concise public hearings starting around the middle of January.

20 If we are delayed in this process, if our investiga-
21 tory process is disrupted by a requirement that all sessions
22 be conducted in public, I think the work of the Committee will
23 be seriously debilitated and defendants will suffer far more
24 harm than plaintiffs.

25 Finally, Your Honor, in a case of this nature, as

1 the Court knows, the public interest factor must be considered
2 in ruling upon a motion for preliminary relief. I would
3 submit to the Court that the public interest hardly supports
4 any motion for preliminary relief. Indeed, the public interest
5 weighs against the granting of this motion. I would submit
6 that the public is entitled to an orderly exposition of the
7 so-called Hughes-Rebozo affair, and this orderly exposition
8 will be best produced by the Court denying the motion for
9 preliminary relief.

10 That is all I have to say, Your Honor. I would
11 suggest once more that this Court display the traditional
12 reluctance of courts to tamper with the inner workings of a
13 legislative committee. I would cite as an example of this
14 traditional reluctance the case of *Eisler v. United States*
15 which was decided by this court in 1948 as found at 170 F.2d
16 273.

17 We may at some time in the future, Your Honor, if
18 you still deem it necessary, submit further papers and we
19 may submit our motion to dismiss.

20 Thank you, Your Honor. I am sorry to burden you
21 with my voice.

22 THE COURT: All right, Mr. Hamilton.

23 Mr. Davis, do you wish to respond on the record?

24 MR. DAVIS: Yes, Your Honor, as briefly as I can.

25 I certainly agree one hundred per cent with the

1 suggestion of counsel for the Committee that the public and
2 the public interest is to have an orderly exposition of the
3 Hughes-Rebozo relationship. But I don't understand why it
4 has to be done in secret before it is done in public. By that
5 I don't mean with TV cameras --

6 THE COURT: Well, that is not an unusual procedure,
7 Mr. Davis. That is how most criminal investigations are
8 conducted. For example, when you are talking about a grand
9 jury proceeding, it is comparable. This is traditional in
10 the American jurisprudence setup.

11 MR. DAVIS: No question about that, Your Honor.
12 That is why we did not object to the several interviews that
13 were held.

14 Be that as it may, what I really think to burden
15 the Court with is just to comment on the cases, because even
16 though I cannot represent at this time that I am an expert
17 in all those cases, but to the extent to which I am familiar
18 with them, Your Honor, it seems to me that they fall into two
19 categories where the courts have expressed a concern of not
20 interfering with the -- well, I call it the legislative
21 process.

22 One group deals with a situation -- I think it was
23 the House Un-American Activities -- where the individual wanted
24 a secret session under the terms of the statute and he was
25 objecting to being required to testify in public, and where

1 the committee was taking the position that it was going to
2 require a public hearing. To me that kind of a situation is
3 quite different than here, because obviously it does not
4 require a factual determination, except in the inverse sense,
5 that made a determination which does not suggest any impropri-
6 ety or failure to comply with the statute. I don't regard
7 those cases as being applicable to our situation.

8 THE COURT: Well, in either event, it is a judgment
9 that has to be made by the particular committee; is that not
10 correct?

11 MR. DAVIS: Subject, I submit, to the court satis-
12 fying itself that in fact the statute or the purpose of the
13 statute is being in good faith complied with.

14 THE COURT: Yes.

15 MR. DAVIS: I agree with that, Your Honor, yes.

16 The second group of cases that I am familiar with,
17 which I am sure Your Honor will recognize, are those groups
18 of cases where the witness was taking a constitutional position
19 or a legal position in refusing to answer or wanting to refuse
20 some specific testimony, contemplated testimony, and the
21 courts quite understandably took the position, well, we are
22 not going to assume that you are going to be required to
23 answer questions without full protection to your rights and
24 whatnot, and therefore we are not going to interfere with the
25 requirement that you appear, the requirement that you stand up

1 to testify and permit the committee to pose specific questions
2 to you, listen to the objections to the questions at that time,
3 rule on it, and then maybe there could be a justiciable
4 controversy, but obviously not wanting to interfere at that
5 point.

6 THE COURT: Mr. Davis, neither is this Court going
7 to assume that there is no basis in fact on any record
8 established by the Senate Committee for the resolution that
9 has been offered and required under the statute. I can't make
10 that assumption either.

11 MR. DAVIS: I appreciate that that assumption cannot
12 be made today. However --

13 THE COURT: This is why I say that the question here
14 is ultimately at what juncture is it within the purview of a
15 federal court to determine whether a legislative committee
16 has operated within the bounds of a statute under which it
17 operates under a resolution and certainly in compliance with
18 its own committee rules. At what juncture?

19 I say to you the status of the law as of this
20 moment is that this is the inappropriate time for the inter-
21 vention of the court, and that is the sole question that has
22 to be determined on this temporary restraining order.

23 MR. DAVIS: I appreciate the concern that the Court
24 is expressing. In so far as the resolution is concerned, I
25 now have and can tender now or submit later this afternoon

1 the transcript of Mr. Gribben's testimony, which is the best
2 evidence and the only evidence there is as to the justifica-
3 tion for the resolution.

4 The point, however, Your Honor, that I cannot overly
5 emphasize, because obviously everything becomes moot,
6 particularly if we don't even get a declaratory order, and
7 quite frankly I am considerably disturbed at the suggestion
8 or the interpretation of appellate court decisions dealing
9 with what I consider to be an entirely different situation,
10 which I translate to the cop on the beat.

11 If in fact the suggestion by Your Honor is the law,
12 granted that I could always presumably come to court when I
13 am cited for contempt. I find it hard to understand why the
14 courts should construe their powers -- because that is what
15 we are talking about -- in such a way, if we recognize, as we
16 must recognize here that there is a particular specific
17 statute having nothing to do with their rules, which directs
18 this committee to comply with, and when, as in any case, there
19 is sufficient evidence tending to suggest that this committee
20 is not complying with at all, to say that the only time that
21 the person who is going to suffer this irreparable injury
22 that we have been discussing, where there is no relief I can
23 have after the fact, if I have a right as the Supreme Court
24 said, and I thought, I honestly thought, Your Honor, before I
25 came here that the concept of stare decisis -- star chamber

1 proceedings was gone with the ages.

2 Now, it is true that sometimes an individual may
3 say I want a secret hearing and he may be denied that oppor-
4 tunity for whatever reason. But to suggest that I am inter-
5 fering with the public interest because I want to say what-
6 ever it is I have to say so that whoever is interested in
7 listening to what I have to say can hear it. How does that
8 interfere with the investigation of anything?

9 I respectfully submit, Your Honor, that at some
10 point -- and I don't know how -- the kind of a situation
11 which is here present can be ever resolved does me little good.
12 That after I have been injured in the manner which I am
13 currently being injured by the very representation that is
14 being made, the Hughes relationship to Hebozo. When am I
15 going to be permitted to tell my story so I can be heard, so
16 I can stop being annoyed and harassed by six, seven, eight,
17 ten different investigative agencies, all of them saying --
18 and under the statute, enabling resolution which specifically
19 empowers that committee to obtain the information from other
20 governmental agencies. They choose not to do so. That is
21 their business.

22 I would like as a matter of conclusion on this to
23 call Your Honor's attention to Section 3A5 and 3A11 of the
24 enabling resolution, which is the other authority for the
25 functioning of this committee, which specifically provides

1 that they can have access to.

2 Now, it is true that if I were here representing
3 someone who had never been interviewed, who had never been
4 investigated by any agency, and where they could say we know
5 absolutely nothing about, I still say, well, what is wrong
6 with going in public and find out? Well, we waste time.

7 To me, all these reasons, as compared to the right
8 of the individual of the freedom from being subjected to
9 secret proceedings, I don't think they compare, Your Honor;
10 I really don't. What conceivable harm, what conceivable
11 delay, what conceivable injury takes place because they asked
12 the questions of me that they asked of me the last two or
13 three days so that whoever wanted to could listen to what is
14 going on? The same as everybody can come into this room and
15 listen to what is going on. How am I interfering with any-
16 thing by saying I want that right, particularly when I have
17 a statute that says I have it.

18 And to suggest that the harm done to me versus the
19 interference, I find nothing anywhere in the Senate resolution,
20 in the statute, in constitutional concepts, in common law, in
21 anything which suggests that by a witness doing something
22 which, I must admit it doesn't happen very often; usually the
23 witnesses say I want to be heard in secret and the committee
24 says no, better to be heard in public, and the courts have
25 understandably been reluctant to interfere with that. I would

1 too.

2 But this is not our situation. And if I don't get
3 some relief from this court and if these people will not
4 await an early date for hearing us on the merits of whether
5 I call it a temporary injunction or declaratory order, because
6 I am confident, because of the nature of the committee itself,
7 if this Court were to say this is a violation of those rights,
8 that they would observe that determination by the court and --

9 THE COURT: It is extremely unlikely that any order
10 by a trial court will be definitive with respect to either
11 side in this controversy. It has never previously been
12 definitive in any of these controversies.

13 In that regard, I will hear you as soon as you want
14 to be heard on your motion for preliminary injunction.

15 MR. DAVIS: May I be heard on the 11th?

16 THE COURT: And if I determine that motion at that
17 time, you then are free to go to the appellate court just as
18 quickly as you can get an appeal. But you recognize there
19 is no action by this court that is going to be definitive and
20 declarative of this litigation, because I don't think the
21 plaintiffs would abide by any determination of the trial court
22 or the committee. It is not the way it is. You understand,
23 we make the record upon which the ultimate determination can
24 be made. That in essence is our function in this type
25 litigation.

1 MR. DAVIS: Well, as I believe Your Honor has been
2 informally advised, but I know as counsel here knows, connected
3 with this same thing I have been called upon to testify in
4 Nevada in the grand jury tomorrow and the next day. I don't
5 know whether or not the U.S. attorney there will grant me a
6 postponement if we would want to be heard sooner than that,
7 if a hearing could be held on the 10th.

8 THE COURT: I had in mind the 10th.

9 MR. HAMILTON: Your Honor, the 10th suits me fine.
10 The only day I cannot do it is the 11th.

11 MR. DAVIS: Let's do it the 10th.

12 THE COURT: Let's do it the morning of the 10th.
13 I will hear you at 9:30 or as soon as --

14 MR. HAMILTON: Your Honor, will you also entertain
15 at that time a motion to dismiss?

16 THE COURT: If you file it promptly and serve it
17 upon the plaintiffs so that they have an opportunity to
18 respond.

19 MR. HAMILTON: I should be able to file it tomorrow.
20 I am not sure whether Mr. Davis will be in town tomorrow.

21 MR. DAVIS: No, I can assure you that I will be with
22 the schedule you fixed up for me. I will be traveling in
23 between.

24 MR. HAMILTON: I will file it with his local
25 attorney tomorrow at some time.

1 MR. DAVIS: I have to leave this afternoon, as you
2 well know, if I am going to make that tomorrow morning date
3 in Las Vegas.

4 MR. HAMILTON: I will serve his local attorney.

5 THE COURT: Let's leave it in this posture. You
6 file it, Mr. Hamilton, as soon as you can. If Mr. Davis is
7 not prepared on the 10th for some reason because he or his
8 associates cannot direct their attention to it, we will
9 determine on the 10th whether there will be additional time
10 for him to respond or whether we will set a new time for
11 argument. Or if argument in fact is necessary. I doubt
12 seriously that extended argument is going to make any difference
13 in this case. We understand the factual allegations.

14 MR. DAVIS: I think so, Your Honor. I am sorry
15 to burden you between now and the 10th.

16 THE COURT: Mr. Davis, you didn't burden this Court.
17 That is exactly why the taxpayers provide judges. I am here
18 because this is where I am supposed to be, and it is not a
19 burden on this Court to consider any litigation that is
20 presented to it. And I have given you the opportunity, which
21 you have requested, publicly to state your position. This is
22 why I have listened to everything you have had to say, and I
23 understand your situation.

24 But as I have indicated, I must be persuaded as to
25 the status of the law that applies to the situation. My

1 responsibility is to apply that law to the particular
2 situation that is presented to me, and that is exactly what
3 I intend to do.

4 So, we will hear you the morning of the 10th on
5 your motion for preliminary injunction. The temporary
6 restraining order is denied.

7 I will take a short recess.

8 (Whereupon, at 11:40 o'clock a.m., proceedings in
9 the above-entitled matter were concluded.)

10 -oo-

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16 REPORTER'S CERTIFICATE

17 Certified to be the original transcript of proceedings.

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19
20
21 
EUGENE T. FEDORATION, C.S.R.
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,)
-against-) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON) ALTERNATIVE MOTION FOR
PRESIDENTIAL CAMPAIGN ACTIVITIES,) SUMMARY JUDGMENT
et al.,)
Defendants.)

In the event that plaintiffs' motion for a preliminary injunction is denied, then, in the alternative, plaintiffs respectfully move this Honorable Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter a summary judgment in favor of the plaintiffs declaring that plaintiffs and all others similarly situated have a constitutional and statutory right to give such testimony and produce such documents as may be required by lawful subpoena in public sessions of the Senate Select Committee on Presidential Campaign Activities, unless and until the record of such public hearing demonstrates that testimony or the production of documents addressed to such witness may (i) relate to matters of national security; (ii) tend to reflect adversely on the character or reputation of the witness or any other individuals, or (iii) divulge matters deemed confidential under provisions of law or government regulation. The grounds for this motion are that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon all of the files and proceedings herein, the transcripts of proceedings before the defendant Committee with respect to Messrs. Glaeser, Gribben and Davis (copies of which are attached hereto as Exhibits A, B and C),

- 2 -

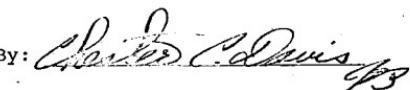
the statement of facts as to which there is no genuine issue filed herewith, the memorandum of points and authorities annexed hereto, and such other evidence as may be adduced at the hearing on this motion.

In the event plaintiffs' motion for a preliminary injunction is denied, plaintiffs respectfully request that the instant motion be heard at the hearing heretofore called for ~~Mon.~~ day, December 10, 1973. Plaintiffs represent to the Court that James Hamilton, Esq., counsel for the defendants, has agreed that if this motion and all supporting papers are filed with the Court by December 7, 1973, the defendants will not object to the motion being heard by the Court at the December 10, 1973 hearing.

Respectfully submitted,

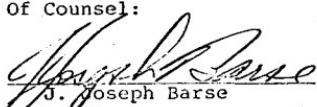
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
)
 Plaintiffs,)
-against-)
) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
)
 Defendants.)
)

STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE
IS NO GENUINE ISSUE

1. On November 29, 1973 the defendant Senate Select Committee on Presidential Campaign Activities adopted the resolution which is attached as Exhibit C to the affidavit of Chester C. Davis, sworn to on December 5, 1973 and filed herein on that date in support of plaintiffs' application for a temporary restraining order.

2. The aforesaid resolution of November 29, 1973 recites that " * * * it is the determination of this Committee that the testimony of Chester Davis, Richard Danner, Ralph Winte, Dave Gribben, Jack Cromar, Walter Glaeser, Roy Crawford, Robert Morgan (custodian of records of Summa Corporation), Robert Worley, Nadine Henley, Jack Real, Carol Dunkle, Vince Kelly, Margaret Sullivan, and the Presidents or custodians of records of the Desert Inn, Landmark, Frontier, Sands, and Castaway hotels * * *"
(a) " * * * may tend to reflect adversely on their character or reputation or the character or reputation of other individuals * * *"; (b) " * * * may relate to matters of national security"; and (c) " * * * may divulge matters relating to the investigations of this Committee that, under its Rules of Procedure, Guidelines, and/or Authorizing Resolution, are deemed confidential."

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3. The persons described in the aforesaid resolution are either named plaintiffs herein or persons who are treated as though they were such plaintiffs pursuant to stipulation and order herein.

4. The defendant Committee has issued, or is in the process of issuing, subpoenas ad testificandum and duces tecum to the persons described in the aforesaid resolution of November 29, 1973.

5. Said subpoenas require that such persons give evidence at sessions of the defendant Committee from which the public and press are and will be excluded and to which only the witness and his/her counsel are or will be admitted.

6. The individuals described in the aforesaid resolution of November 29, 1973 have requested that they be permitted to testify and produce other evidence at sessions of the defendant Committee which are open to the public and the press.

7. The defendants have denied such requests and represented that criminal contempt proceedings will be initiated against the aforesaid persons if they fail to testify and produce documents at secret sessions of the Committee rather than at public sessions as requested by said persons.

8. Dave Gribben, Walter Glaeser and Chester Davis have, under protest, given testimony at secret sessions of the defendant Committee. Transcripts of such testimony are attached to the plaintiffs' cross-motion for summary judgment herein as Exhibits A, B and C.

9. Richard Danner, Ralph Winte and Chester Davis have been interviewed at length and in detail by the staff of the defendant Committee concerning matters which the Committee regards as germane to the matters it is authorized to investigate. The results of extensive interviews of Messrs. Danner, Winte and

Davis by other agencies of the government, including the Internal Revenue Service and the Securities and Exchange Commission, are available to the defendants, as is the deposition of Mr. Danner filed in proceedings before the United States District Court for the Central District of California.

10. The defendants have made no effort to obtain the information described in paragraph 9.

11. The defendants are free to conduct interviews of Roy Crawford, Robert Morgan, Robert Worley, Nadine Henley, Carol Dunkle, Vince Kelly, Margaret Sullivan, and the presidents or custodians of records of the Desert Inn, Landmark, Frontier, Sands and Castaway hotels. No such interviews have been conducted by the Committee.

12. Testimony given and evidence produced at secret or Executive Sessions of the defendant Committee have thereafter been disclosed, in some cases by the staff of the Committee, to the press.

13. The staff of the Committee has commented to the press on the conduct of secret or Executive Sessions of the defendant Committee, including comments as to what the defendants expected to learn at such secret sessions.

14. The New York Times of Saturday, December 1, 1973 reported that "the committee's lawyers believe that there are no grounds for the suit [the instant action] * * *." This statement is an accurate account of what the lawyers for the defendant Committee told representatives of The New York Times. The December 1, 1973 edition of The New York Times reported, with respect to the plaintiffs herein, "'If they're not hiding something, what are they scared of?" one investigator remarked today. "I think they are afraid that something more might come out, and we're trying to find out what the something is.'"

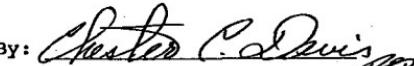
15. The Chairman of the defendant Committee has admitted that he knows of no way to guarantee that information

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obtained in private sessions of the defendant Committee will not be leaked to the press.

Respectfully submitted,

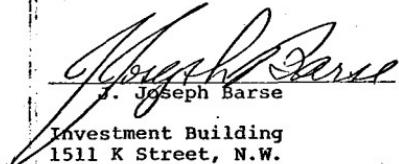
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RICHARD DANNER, et al.,)
Plaintiffs,)
-against-) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT,
DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION

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IN THE UNITED STATES DISTRICT COURT
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RICHARD DANNER, et al.,)
Plaintiffs,)
-against-) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT,
DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION

I. Summary Judgment and Declaratory Judgment.

Plaintiffs respectfully submit this memorandum in support of their motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The nature of this action and the questions presented by this motion are fairly simple. Various subpoenas have been served upon plaintiffs requiring their testimony at Executive Sessions of the defendant Committee. Plaintiffs have no objection to testifying; in fact, certain plaintiffs have already testified and have been interviewed in informal sessions of the Committee. What plaintiffs do object to is being forced by Committee fiat to testify in secret session, in violation of their constitutional and statutory right to testify in full view of the public, with the public the judge of the truth.

The defendants are denying this right by compelling plaintiffs, under threat of contempt penalties, to testify in secret, thereby subjecting them to the continuing, irreparable injury inflicted by the distorted, incomplete and speculative news accounts which have followed inexorably upon the giving of such testimony in secret proceedings.

The facts are set forth in detail in the heretofore-submitted affidavit of Chester C. Davis. Suffice it to point out that the defendant Committee, in violation of the Constitution and the governing statute, demanded testimony in secret session notwithstanding the fact that they had failed to make the determinations required by statute in order to justify such secret testimony. Only after counsel for plaintiffs pointed out this failure to make such determinations did the Committee belatedly pass a resolution purporting to make them. We use the word "purporting" because the resolution neither sets forth nor indicates any factual basis for the determinations. Nor could it, for there are none. The resolution does no more than parrot the statutory language.

We submit that there are no facts in dispute as to the following and that plaintiffs are therefore entitled to summary judgment

(1) Plaintiffs have a constitutional and statutory right to testify in public; unless there are compelling reasons (absent in this case) to the contrary;

(2) The Committee's purported determination that plaintiffs are required to testify in secret has no basis in the record and is a nullity;

(3) The denial of plaintiffs' right to testify in public is causing irreparable injury.

Argument

1. Plaintiffs Have a Constitutional and Statutory Right to Testify in Public.

The right, when forced to speak, to be able to do so on the public record rather than in secret, is protected by the First Amendment freedoms of speech and assembly and by the Due Process Clause of the Fifth Amendment. It is basic to our entire system of speech, assembly and fair play. It was a principal aim of our founding fathers, who sought to establish a system of government where there was no room for

- 3 -

Star Chamber proceedings of the British monarchy. As stated in Mr. Justice Black's famous dissenting opinion in In Re Groban, 352 U.S. 330, 352-353 (1957):

Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival.

The Supreme Court has long recognized "this nation's historic distrust of secret proceedings" and "their inherent dangers to freedom."

In Re Oliver, 333 U.S. 257, 273 (1948). The United States Court of Appeals for the District of Columbia Circuit has similarly recognized an open or public hearing to be a "fundamental principle of fair play." Fitzgerald v. Hampton, 467 F.2d 755, 764 (D.C. Cir. 1972).

Concededly, there are few cases directly on the constitutional point, but that is because in most instances of court intervention witnesses are attempting to avoid public scrutiny and are seeking to have the courts enforce a secret hearing upon the legislative or judicial body. Precisely the opposite is true here, where it is this very secrecy which plaintiffs are attempting to prevent. The dearth of authority should not prevent the Court, however, from analyzing the basics of what is being sought and determining that constitutional rights are indeed involved. Surely the rights of free speech and assembly contemplate something other than speech by one man and his counsel totally cut off from those whom he wishes to hear him. And just as surely, the basic fairness and sense of justice epitomized by due process envisages more than forced, secret testimony followed by selective distortions in the media. In such situations, the witness is left with no effective or meaningful way to defend himself against unfounded accusations which gain added significance in the public mind because they allegedly sprang from his own testimony, given under oath in the majesty of a Senatorial forum. Cf. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The Supreme Court has said that the

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"fundamental requisite of due process of law is the opportunity to be heard" (Grannis v. Ordean, 234 U.S. 385, 394 (1914), and other courts have called "the right to be heard" an "indispensable requisite to due process and basic to our system of jurisprudence" (e.g., Sands v. Wainwright, 357 F.Supp. 1062, 1086 (M.D. Fla. 1973)). We respectfully submit that that right has been rendered totally meaningless in the circumstances of this case.

In this case, however, the Court need not even reach the constitutional issue if it so chooses, because the hearings which plaintiffs are being required to attend are governed by a duly-enacted statute. This statute, 2 U.S.C. § 190a-1(b) (1973 Supp.), 84 Stat. 1511, as amended, specifically requires that the testimony of a witness

* * * shall be open to the public except when the Committee determines that the testimony to be taken at that hearing may relate to a matter of national security, may tend to reflect adversely on the character or reputation of the witness or any other individual, or may divulge matters deemed confidential under other provisions of law or Government regulation
* * *. [Emphasis supplied.]

This provision was added to the United States Code to further "as a basic goal the opening of Committee activities to full public view" and to establish "an open door policy for Committee hearings." House Report No. 91-1215 (91st Cong., 2d Sess., 1970).

Here, the defendants issued subpoenas requiring plaintiffs to testify in secret--threatening to hold them in contempt for failure to comply with the same--without even purporting to make the determination required by 2 U.S.C. § 190a-1(b) as a prerequisite to proceeding in secret. Only after plaintiffs had filed the complaint herein did the defendants go through the motion of purporting to comply with the controlling statute by making a blanket and conclusory "determination" that the evidence of sixteen different witnesses could lawfully be compelled in secret. We submit that this purported resolution was nothing more than an afterthought in a vain and belated attempt to comply with the statute.

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The Committee's resolution of November 29, a copy of which is attached as Exhibit C to the Affidavit of Chester C. Davis sworn to December 5, 1973, in support of plaintiffs' motion for a temporary restraining order, shows on its face that it is not based upon any facts of record but only on the Committee's unsupported "expectations" as to what the Committee "normally" receives as evidence and what such evidence "tends generally" to show. Nowhere does the Committee make any determination that the testimony of a particular witness meets one or more of the statutory criteria.

The statute cannot be repealed by a Committee fiat that does no more than parrot the statutory language. Quite the contrary, it has long been held that a statutorily-imposed duty to make a determination carries with it "fundamental procedural requirements." Morgan v. United States, 298 U.S. 468, 480 (1936). At a minimum these "fundamental procedural requirements" include the requirement that the determination have some basis in the record and that the Committee apprise the witness of that basis. Id. See also Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1971) (a Congressional Committee "has an obligation to give an explanation in response to a witness's objection"), and Yellin v. United States, 374 U.S. 109 (1963) (a Congressional Committee must exercise its discretion according to the standards which a witness has a right to have considered).

When the Committee's resolution is viewed against the record, it is clear that it does not satisfy the statutory requirement of a "determination". First, the extensive information already provided to the Committee by Messrs. Danner, Winte and Davis during the course of informal interviews provides no basis upon which the Committee could have made the requisite statutory determination as to their testimony, and we hereby challenge the defendant Committee to show the Court any basis whatever for such a determination from those interviews or from the testimony of Messrs. Glaeser and Gribben.

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Second, the Committee has rejected plaintiffs' request that other witnesses be interrogated for the limited purpose of revealing whether or not the Committee's resolution is, in fact, a fraud on the public. The transcript of Mr. Gribben's testimony, a copy of which will be furnished to the Court, makes clear beyond peradventure that there was and is absolutely no support in or out of the record for the Committee's determination.

Third, it should be noted that the Committee's "determination" that testimony must be kept secret is directly at odds with the Committee's admission that it is unable to keep testimony given at Executive Session secret. Why plaintiffs must be prejudiced by leaks to the press on the grounds that information must be kept from the press is a riddle the Committee has not yet attempted to solve. Even more puzzling is the Committee's "determination" that plaintiffs' insistence upon a public hearing in order to protect themselves from prejudicial leaks can be defeated by a "determination" that a public hearing would reflect adversely on plaintiffs' reputations.

The short of the matter is that the Committee has not made--and there is no basis for making--the determination required by 2 U.S.C. § 190a-1(b). Accordingly, such purported determination by the Committee is arbitrary and capricious, a gross abuse of Committee discretion, and beyond the statutory power of the Committee. It cannot be permitted to stand.

Moreover, particularly in cases where the staff has already fully investigated a matter and talked at length with the prospective witnesses, the proper method of proceeding is not to pass a blanket resolution which could not possibly apply to all witnesses or to the entire testimony of any one witness. Rather, the proper method is to place each witness on the stand in public, allow him to testify, and then revert to Executive Session when and if the record clearly demonstrates that one or more of the three areas recited in the statute are

being invaded. Only in this way can the areas protected by the statute be accommodated with the witness' right to give his story freely, openly and before the world.

On at least two grounds, this is a particularly apt case for declaratory relief. First, the investigation involving plaintiffs is ongoing. All plaintiffs could still testify in public, including those who have already testified in private. Some have not testified at all. Plaintiffs are confident that if this Court were to declare that their constitutional and/or statutory rights include the right to appear and testify in public, the Committee would accord them the declared rights. Plaintiffs cannot believe that a Senatorial committee would ever deny them rights which have been clearly established in court.

Secondly, a declaratory judgment in this action would be appropriate even if all of the plaintiffs had already testified. Judge Gesell, in Nader v. Bork, D.C.D.C., Civil Action No. 1954-73, November 1, 1973, recognized that there are some instances in which the need to declare a rule of law is so great that the ruling need not result in positive action. In that case, Judge Gesell was ruling on the firing of special prosecutor Cox after the firing had taken place and after Mr. Cox had stated unequivocally that he would not allow himself to be reinstated. Judge Gesell nevertheless entered a declaratory judgment to the effect that the firing had been illegal. He did so because "There is a pressing need to declare a rule of law that will give guidance for future conduct with regard to the Watergate inquiry" (slip opinion, p. 4). Nothing could be more in the public interest -- so vital for our times -- than for this Court to declare that unless and until it is shown on an adequate record that the statutory areas may be invaded, witnesses before the Watergate committee are entitled to have their testimony and documents received in public.

All of the elements necessary for declaratory relief are present here. That plaintiffs have "a case of actual controversy," a requirement for seeking declaratory relief, is irrefutable. The parties to this lawsuit are adverse, the relief sought by the parties

is adverse, and the damage being suffered is real and irreparable. This Court has jurisdiction because the issue before this Court involves a federal question, and the harm that has been done, and continues to be done, is far in excess of the jurisdictional amount.

2. The Denial Of Plaintiffs' Right To Testify In Public Is Causing Irreparable Injury.

Plaintiffs' assertion of their right to testify in public is no mere exercise in civics. The plain fact is that it has become a hallmark of the defendant Committee's procedure that, whenever testimony is compelled in secret, the giving of such testimony is followed by prejudicial, incomplete, distorted or speculative news accounts of such testimony. We mean no derogation of the press in this regard, because the press could hardly be expected to provide a full and accurate account of proceedings from which it was excluded.

The Chairman of the defendant Committee has himself conceded that he:

knew of no way to guarantee that information obtained in the private sessions would not trickle into public print.

"I know of no way to stop men from talking," Mr. Ervin told reporters. "The only way men who have responsibility for keeping secrets can do so is by exercising will power, and if they refrain from using will power, then no one can force them to do so." [New York Times, June 22, 1973, page 14, col. 1.]

In fact, Senator Ervin, at Executive Session on December 3, 1973, when pressed as to the leaks constantly emanating from his Committee, reiterated that he could not "control the press" (Transcript at 13).

Moreover, the defendants have explicitly recognized before this Court the prejudicial effect of such leaks. In a brief signed on behalf of Messrs. Dash and Hamilton of the Committee staff, the Committee asserted that its proceeding should be conducted in public on the ground that

* * * it would appear most unlikely that public information would be reduced if the Select Committee's hearings were placed in Executive Session or otherwise interfered

with by this Court. Indeed, it is more reasonable to believe that public speculation, as opposed to informed opinion, would increase. [Reply Memo of Points and Authorities filed June 7, 1973 by the defendant Committee in Application of Senate Select Committee on Presidential Campaign Activities, (U.S.D.C.D.C. Misc. No. 70-73) at 9-10; emphasis in original.]

The Committee now insists on a power to fuel the very same "public speculation" at the expense of plaintiffs' appeal that they be judged by "informed opinion."

The Davis affidavit makes clear that such speculation and distortion -- some of it, unfortunately, attributed to sources on the Committee's own staff -- is causing irreparable injury to plaintiffs. A particularly egregious example is found in the fact that plaintiffs' request that they be permitted to testify in public has resulted in stories in the national press, attributed to unidentified Committee sources, to the effect that plaintiffs were attempting to hide information from the public, when in fact plaintiffs are attempting precisely the opposite. We submit that it is time, as required by the Constitution and the controlling statute, to let the public itself decide who is trying to hide the facts. Failure to require compliance with the Constitution and the statute will leave plaintiffs at the mercy of the continuing prejudicial effect of leaked distortion.

Conclusion

This is a most extraordinary case. A Committee of the United States Senate, charged with investigating alleged wrongdoing, is itself engaged in wrongdoing by arbitrarily and capriciously denying to plaintiffs their constitutional and statutory rights to a public hearing. We ask that this Court declare the impropriety of such action and thus encourage this Committee to allow plaintiffs to testify in public.

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For the foregoing reasons and for the reasons set forth in the accompanying affidavit of Chester C. Davis, we respectfully submit that the motion for summary judgment should be granted in its entirety.

II. Preliminary Injunction

1. This Matter Is Properly Before the Court.

The courts of this Circuit recognize that challenges to legislative investigations present justiciable issues. See United States Servicemen's Fund v. Eastland, D.C. Cir. Nos. 24,279, 24,412, 71-2034, August 30, 1973; Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972); Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971). The courts have thus exercised their authority in cases where plaintiffs have presented a claim that a constitutionally protected right is being invaded by definitive action taken under governmental authority. *Id.* Plaintiffs submit that the efforts by the defendant Select Committee requiring plaintiffs to give their testimony and produce documents at a secret Executive Session constitutes a deprivation of plaintiff's due process right to an open and public hearing. Most recently, the United States Court of Appeals for this District recognized that an open public hearing is a "fundamental principle of fair play". See Fitzgerald v. Hampton, 467 F.2d 755, 764 (D.C. Cir. 1972). See also the discussion at the outset of the Argument portion of Part I of this Memorandum.

In United States Servicemen's Fund, *supra*, the Court of Appeals restricted the subpoena power of Senate and House committees because that power threatened a deprivation of First Amendment rights which could be vindicated in no way other than by court decree. Precisely the same is true here. In that case a court decree was the only possible vindication because the party who was attempting to prevent his records from being subpoenaed was not the party being called before the committee, and therefore a contempt citation and

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subsequent court review were not possible. Here, a contempt citation and court review are likewise impossible because plaintiffs, far from balking at testifying, are insisting upon making a full and complete disclosure. They are contesting only the forum for such disclosure, not the disclosure itself. Surely plaintiffs should not be penalized by the denial of court sanctions merely because they seek not to be contemptuous or recalcitrant but instead want to cooperate fully with the Committee. As a matter of fact, refusing to cooperate so as to bring on a contempt citation would defeat the very right they seek to protect, because it would say to the public that plaintiffs are denying disclosure whereas precisely the opposite is true.

The United States Servicemen's Fund case alone effectively dispels any notion that the Speech and Debate Clause prohibits the remedy sought here. Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), supports the same result where congressmen are violating a federal statute.

2. There Is A Substantial Likelihood Plaintiffs Will Succeed On The Merits.

It is well settled that to be entitled to a preliminary injunction, the moving party must make a clear showing of probable success upon the merits at trial. See Societe Comptoir de L'Industrie, etc. v. Alexander's Dept. Stores, 299 F.2d 33 (2d Cir. 1962). Plaintiffs submit that the record before this Court conclusively demonstrates that the Committee's failure to grant them a public hearing constitutes a clear violation of the Constitution and the applicable statutory law (Title 2 U.S.C. 190a-1(b)). Defendants argue that the resolution adopted by the Committee on November 29, 1973, constitutes the requisite determination to require plaintiffs' testimony to be given at Executive Session. Plaintiffs submit that this resolution is a sham without any justification in fact.*

* It should be pointed out to the Court that the resolution was adopted after many of the subpoenas had been served upon plaintiffs. If the Court were to find that this resolution constitutes a determination that plaintiffs should testify at Executive Session, it would seem that subpoenas issued prior to November 29, requiring plaintiffs to testify at Executive Session, would be invalid since served prior to the alleged determination by the Committee.

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On December 4, 1973, plaintiff Gribben appeared before the Committee at Executive Session. His testimony was given under protest because of the secret nature of the forum at which he appeared. A copy of the record of his testimony is being supplied to this Court. His testimony is very informative. There is not one word in the entire transcript indicating that Mr. Gribben has ever had any knowledge whatever of any matters that relate to national security, which might tend to reflect adversely on the character or reputation of himself or any one else, or which might divulge any confidential matters.

In addition to Gribben, plaintiff Glaeser also testified before the Committee at Executive Session. As in the case of Gribben, Glaeser's testimony, a copy of which is being delivered herewith, contains no information that in any way might be construed to substantiate the Committee's claim that his testimony could come under any of the three exceptions to a public hearing set forth in the statute. Plaintiffs submit that the testimony of Messrs. Gribben and Glaeser conclusively demonstrate that the Committee failed to make the required determination under 2 U.S.C. 190a-1(b). Accordingly, the subpoenas issued by the Committee requiring their attendance at Executive Session are invalid.

A determination that the testimony of Gribben or Glaeser meets the requirements of the statute would, in effect, render this section of the statute a nullity. However, the fallaciousness of the resolution is even more readily apparent in the case of Messrs. Danner, Winte and Davis. Each of these plaintiffs has already been interviewed by the Committee staff for an aggregate period of time in excess of 15 hours. At no time during the course of any of the interviews did Messrs. Danner, Winte or Davis testify with respect to matters involving national security or matters that would adversely affect their reputations or the reputations of others.

As a further indication of the total inadequacy of the resolution, we respectfully refer the Court to an article attached hereto which appeared in the Washington Star-News on December 6, 1973 (page A-8, col. 1). As the Court will recall, and as reflected in the Star-News story, Mr. Hamilton told Your Honor at the argument on the temporary restraining order that information from White House sources disclosed some questions relating to Donald Nixon and national security. Yet United Press International, according to the Star-News, then quoted "special Senate Watergate committee sources *** as saying [that] the investigation of F. Donald Nixon is not related to the undisclosed 'national security' matter in which he was also involved, but [instead] concerns whether he interceded with the President to help get approval of the sale of an airline to Hughes in 1969." Thus, even as to the single example given by defendants' counsel of possible testimony remotely relating to any of the statutory exceptions, counsel apparently had to be corrected by "committee sources", and the alleged national security issue disappeared into thin air. The story demonstrates not only still another in the steady stream of communications between the Committee and the media but the total unreliability and absurdity of the Committee resolution.

The failure of the Committee to follow the statute is a fatal rather than a technical defect. It has long been held that a statutory duty to make a determination carries with it "fundamental procedural requirements". Morgan v. United States, 298 U.S. 468, 480 (1936). At a minimum, these "fundamental procedural requirements" include the requirement that the determination have some basis in the record and that the Committee apprise the witness of the basis. Id.

As the Supreme Court indicated in Yellin v. United States, 374 U.S. 109 (1963), a Congressional Committee, in exercising its discretion, must do so according to the standards which a witness has a right to be apprised of and to rely upon. In the case at hand, these standards are clearly set forth in 2 U.S.C. § 190a-1(b). Yet

the Committee has seen fit to ignore what the law requires. The Court cannot countenance this total disregard by the Committee of the statute when fundamental rights are at stake.

The Committee resolution requiring the plaintiffs to testify at Executive Session constitutes a complete abuse of the subpoena power granted to the Committee by Congress, and this Court must exercise its "responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of government". Stamler v. Willis, 415 F.2d 1365, 1369 (7th Cir. 1969), cert. denied, 399 U.S. 929 (1970).

3. There is a Substantial Likelihood of Harm to the Plaintiffs If Relief is Denied and None to Defendants If Relief is Granted.

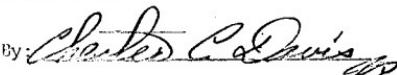
We have already discussed in prior sections of this Memorandum the serious, irreparable and unconscionable harm that will be visited upon plaintiffs if the Court denies relief and they are forced to continue to testify and produce documents behind locked doors. Suffice it to say here that their reputations have already been harmed, not by testimony in public, which is the type of harm the statute sought to avoid, but by inaccurate and incomplete leaks about their appearance in secret and by totally unjustified inferences and speculation to the effect that they are attempting to withhold information. For example, a staff member of the Committee in an article appearing in the New York Times on December 1, 1973, indicated that the refusal of the plaintiffs to appear at Executive Session was suggestive of the fact that plaintiffs had information they were not willing to disclose. As this Court knows, this is diametrically opposed to plaintiffs' position, and it is the very thing plaintiffs are seeking to avoid through this vindication of their rights. Each day that the Committee meets and is able to compel the witnesses to appear and testify at Executive Session, plaintiffs are forced to risk the very thing they are attempting to avoid -- the speculative, distorted and prejudicial news releases appearing in the media relating to their testimony.

Neither defendants nor the public can possibly be harmed if the requested relief is granted. Insofar as the testimony is concerned, it is the same whether in public or private. Should particular questions directed to particular witnesses reveal that any of the forbidden areas in the statute may be invaded, the Committee, the witness and his counsel can repair to Executive Session. Thus everyone's rights will be adequately protected.

Defendants plead delay. But that is really an objection to these hearings rather than to appearances in public, for as we have seen, it takes no longer to testify openly than secretly. There will be no delay by plaintiffs once this matter has been finally decided.

Respectfully submitted,

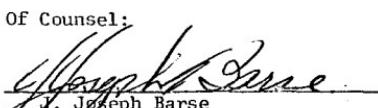
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the within motion for summary judgment, statement of material facts as to which there is no genuine issue, proposed order, and memorandum of points and authorities to be served upon James Hamilton, Esq., counsel for the defendants, by having a copy hand-delivered to him at his office, G-308, New Senate Office Building, Washington, D. C., on this 7th day of December, 1973.



Jack Barre
Counsel for Plaintiffs

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al.,)
Plaintiffs,)
v.)
THE SENATE SELECT COMMITTEE ON) Civ. No. 2107-73
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants)

)

MOTION FOR SUMMARY JUDGMENT

Defendants hereby move the Court, pursuant to Rule 56, F.R.Civ.P., to grant them summary judgment on the merits of this controversy and dismiss this action. Support for this motion is found in the accompanying Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and In Support of Defendants' Motion for Summary Judgment and in defendants' Statement of Material Facts As To Which There Is No Genuine Issue.

Respectfully submitted,

Samuel Dash (RDR)
Samuel Dash
Chief Counsel

Fred D. Thompson
Minority Counsel

Rufus Edmisten
Deputy Counsel

James Hamilton
Assistant Chief Counsel

Richard Stewart
Special Counsel

Ronald D. Rotunda
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Sherman Cohn
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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al.,)
Plaintiffs,)
v.)
THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)

CIV. NO. 2107-73

ORDER

This matter having come before the Court on plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment and on defendants' Motion for Summary Judgment, it is hereby this _____ day of December, 1973,

ORDERED that plaintiffs' Motions for Preliminary Injunction and Motion for Summary Judgment be and are denied, and it is

FURTHER ORDERED that defendants' Motion for Summary Judgment be and is granted.

Aubrey E. Robinson, Jr.
U.S. District Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
THE SENATE SELECT COMMITTEE ON)	Civ. No. 2107-73
PRESIDENTIAL CAMPAIGN ACTIVITIES,)	
et al.,)	
)	
Defendants)	
)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The purpose of plaintiffs' lawsuit appears threefold: First, they seek to restrain defendants from requiring them to testify in private session until the Select Committee, pursuant to 2 U.S.C. § 190a-1(b), determines that private sessions are appropriate. Second, they ask the Court to prohibit defendants from forcing compliance with the Committee's subpoenas until plaintiffs are granted a hearing by the Committee on their objections to the subpoenas and a determination respecting those objections is made. Finally, plaintiffs seek to proscribe defendants from initiating or threatening contempt proceedings against plaintiffs for reason of noncompliance with the subpoenas before plaintiffs' objections to the subpoenas are heard and a determination thereon is obtained.

Two motions are now before the Court. Plaintiffs, having lost their motion for a temporary restraining order on December 5, now request a preliminary injunction restraining defendants (1) from private hearings until an appropriate section 190a-1(b) determination is made and (2) from taking action respecting contempt proceedings until such determination occurs. Defendants move for summary judgment and dismissal.

At the outset it should be realized that this lawsuit is a bald effort to disrupt and delay the orderly conduct of the Committee's investigatory processes. As any experienced investigator, congressional or otherwise, knows, it is simply not feasible to conduct a productive investigation of sensitive matters in full public view. To conduct an investigation of alleged illegal, unethical or improper activities in the glare of public scrutiny is to ensure that leads dry up, witnesses become devious or forgetful and prospective witnesses disappear. A public investigation also risks the unnecessary exposure of evidence that is defamatory, involves national security matters, or is deemed confidential under law or government regulation. Moreover, as recognized by the Committee's Guidelines, Para. 2, it would be imprudent to present a witness to the full Committee at public hearing without first ascertaining whether the witness has anything relevant to the subject matter under investigation. As recent history establishes, the Committee is not chary of public testimony, but it does decline to proceed to public hearings before it is satisfied that such hearings will be productive. And it is the Committee--not the witnesses who appear before it--that must be the judge of the most appropriate means of discharging its legislative duties.

Moreover, this lawsuit is without merit and should be dismissed forthwith by the Court. We expand below (sections I, II) on the reasons for dismissal but in summary form they are these: First, the Speech and Debate Clause of the Constitution prohibits a suit against legislators and their aides which would interfere with the performance of their legitimate legislative duties. Second, plaintiffs have received or will receive the full relief their suit demands. The Select Committee has made a good faith determination, pursuant to 2 U.S.C. § 190a-1(b), that the Committee's hearings at this stage should be in private session.

because the evidence that will be adduced may be defamatory, involve national security matters, and divulge matters deemed confidential under law or government regulation. The plaintiffs have been or will be given full, timely opportunity to hearings on their objections respecting the Committee's subpoenas. These hearings have been and will be conducted in complete compliance with the Committee's Rules and Guidelines and applicable Due Process standards. Since all relief sought by plaintiffs has been or will be timely granted, this suit serves no useful purpose.

Because plaintiffs have no chance of success in this suit, the motion for preliminary injunction must fail. That motion is also faulty because plaintiff can show no irreparable harm if defendants continue their investigation under normal procedures; on the other hand, granting the relief sought would seriously delay and disrupt the Committee's investigations at a time when the Committee's expiration date (February 28, 1974) is fast approaching. Additionally, plaintiffs cannot show that granting relief is in the public interest. To the contrary, delay and disruption of the Committee's hearings would, we submit, contravene the public interest. Our arguments regarding the motion for preliminary injunction are presented more fully in section III below.

I. The Speech and Debate Clause Forecloses This Suit.

Plaintiffs do not dispute that the conduct they challenge comprises official acts performed in the exercise of the Committee's legislative responsibilities. But they fail to recognize that the Speech and Debate Clause of the Constitution (Art. I, Sec. 6, Cl. 1) -- a privilege limited to the Legislative Branch of Government -- protects such official activity. Gravel v. United States, 408 U.S. 606, 619-20 (1972);

Tenney v. Brandhove, 341 U.S. 367 (1951); Hearst v. Black, 66 U.S.
App. D.C. 313, 316-17, 87 F. 2d 68, 71-72 (1936). */

Directly controlling here is the Supreme Court's recent decision in Gravel. While narrowing the scope of Speech and Debate immunity in other respects, the Court made clear that committee hearings are a central part of a senator's official duties, and that a senator is thus immune from suit for his conduct of such hearings:

"... /A/ Member's conduct a legislative committee hearings . . . may not be made the basis for a civil or criminal judgment against a member because that conduct is within the 'sphere of legitimate legislative activity.' " 408 U.S. at 624.

And last term in Doe v. McMillan, 93 S. Ct. 2018, 2025 (1973), the Supreme Court reasserted that:

"Congressmen and their aides are immune from liability for their actions within the legislative sphere even though their conduct, if performed in other than legislative context, would in itself be unconstitutional. . . ."

Moreover, this Court, in National Citizens Committee for Fairness to the President v. Senate Select Committee on Presidential Campaign Activities, C.A. No. 1758-73 (September 21, 1973) (Greene, J.), petition for injunction pending appeal denied (D.C. Cir., No. 1758-73, Sept. 24, 1973), application for injunction pending appeal denied (S. Ct. No. A-319, Sept. 26, 1973) (Burger, J.), dismissed an action brought to prohibit the Committee's public hearings in part because the suit was prohibited by the Speech and Debate Clause. A suit to control a Committee's course of hearing and deliberation strikes at the very heart of the legislative process which the Speech or Debate Clause protects. The overriding

*/ In fact, plaintiff in their lengthy papers filed on December 5, make no mention of the Speech and Debate Clause and cite no case that would dispel its application in the present case.

policy of the clause and the decisions discussed above mandate
dismissal of the present action. */

*/ In U.S. Servicemen's Fund v. Eastland, U.S. App. D.C. ,
 Fed. 2d (No. 24, 279; 24, 412; 71-2034, August 30,
1973), the Court of Appeals refused at the outset of litigation to dismiss
congressmen defendants from a lawsuit challenging the issuance of a
congressional subpoena. In that suit, however, the Court concluded that
the subpoena served no legislative purpose and was an unconstitutional
invasion of the plaintiff's First Amendment rights. The Court thus
determined that there was a sufficiently substantial question whether
the subpoena involved "legislative" acts to make it inappropriate to dismiss
the congressmen as parties. That ruling has no bearing here where the
Committee's activities are plainly "legislative" ones and it is clear, as
developed in the next section, that no constitutional or statutory provision
has been violated. Moreover, the subpoena in that case was directed at
a third party bank, whose records contained information relating to the
plaintiff Fund. Since the bank would not disobey the subpoena in order to
protect the Fund's rights, the only remedy available to the Fund was an
injunctive action. Here, however, plaintiffs may secure a judicial
determination on their claims by refusing to comply with the Committee's
subpoenas and raising these claims as a defense in a contempt proceeding.

II. Plaintiff's Suit Must Be Dismissed Because the Full Relief Their Complaint Requests Has Been or Will Be Provided

Plaintiff's primary prayer for relief is that the defendants be restrained from taking testimony in private session until the determination specified by 2 U.S.C. § 190a-1(b) is made. This section declares in pertinent part:

"Each hearing conducted by each standing, select, or special committee of the Senate (except the Committee on Appropriations) shall be open to the public except when the committee determines that the testimony to be taken at that hearing may relate to a matter of national security, may tend to reflect adversely on the character or reputation of the witness or any other individual, or may divulge matters deemed confidential under other provisions of law or Government regulation . . . "

There must be a serious question whether this section is applicable at all to investigative proceedings such as those in issue here. As indicated above, a requirement that all investigatory proceedings, whether under oath or not, be conducted in public would seriously debilitate the effectiveness of such investigations.

In any event, the Committee has now made the determination for private sessions required by the statute. On November 29 it unanimously adopted the following resolution:

"It is hereby this 29th day of November, 1973, by the Senate Select Committee on Presidential Campaign Activities

RESOLVED:

The Senate Select Committee is empowered by S. Res. 60, 93rd Congress, 1st Session (Feb. 7, 1973) to investigate "illegal, improper or unethical activities" relating to the presidential campaign and election of 1972. Because of the nature of its investigations, the testimony and evidence the Committee receives tend generally to reflect adversely on the character or reputation of the witnesses testifying or others and

normally divulge matters that, under the Committee's Rules of Procedure, Guidelines and/or Authorizing Resolution, are deemed confidential. Upon consideration of these factors and upon consideration of the nature of the evidence the individuals herein enumerated are expected to produce, it is the determination of this Committee that the testimony of Chester Davis, Richard Danner, Ralph Winte, Dave Gribben, Jack Cromar, Walter Glaeser, Roy Crawford, Robert Morgan (custodian of records of Summa Corporation), Robert Worley, Nadine Henley, Jack Real, Carol Dunkle, Vince Kelly, Margaret Sullivan, and the Presidents or custodians of records of the Desert Inn, Landmark, Frontier, Sands, and Castaway Hotels may tend to reflect adversely on their character or reputation or the character or reputation of other individuals and may divulge matters relating to the investigations of this Committee that, under its Rules of Procedure, Guidelines, and/or Authorizing Resolution, are deemed confidential. It is also the determination of this Committee, based on its expectations as to the nature of certain testimony these witnesses may give, that their testimony may relate to a matter of national security. The Committee thus determines that the testimony of these witnesses should, at this stage, be taken in Executive Session. The Committee, however, recognizes that these witnesses retain all rights afforded witnesses under the Committee's Rules of Procedure, Guidelines and Authorizing Resolution.

This resolution was adopted in good faith by the Committee after representations by its counsel that their inquiries might produce information that would tend to reflect adversely on certain individuals and might involve matters of national security. The statement to the Committee by staff counsel regarding the possible involvement of national security matters was based on express representations to that effect by J. Fred Buzhardt, Special Counsel to the President. See generally the Minutes Excerpt from the Committee's November 29 meeting attached to defendants' Statement Of Material Facts As To Which There Is No Genuine Issue. Because defendants have made the statutory determination plaintiffs' request, plaintiffs' claim in this respect is now moot. The suggestion in Mr. Davis'

affidavit, p. 4, that this resolution was "a fraud on the public" must be dismissed as unsupported, imprudent advocacy.

Plaintiffs' claims that Due Process demands a public hearing is unfounded. It is, of course, well recognized that traditional Due Process requirements applicable to judicial proceedings are not in all respects relevant to legislative hearings. E. g., United States v. Fort, 143 U.S. App. D.C. 255, 443 F.2d 670(1970); see also Hannah v. Larche, 363 U.S. 420(1960). Plaintiffs have cited no case holding that Due Process demands that legislative investigations be conducted in public session and we know of no such holding. The case of In Re Groban, 352 U.S. 330(1957), which holds that Due Process standards do not even give a witness the right to be accompanied by his attorney at a private investigatory administrative hearing, suggests that there is no Due Process requirement that legislative investigations be thrown open to the public. */

Plaintiffs also seek to prevent defendants from enforcing their subpoenas ad testificandum and duces tecum and from initiating contempt proceedings against them until plaintiffs have been given an opportunity to be heard on their objections to the subpoenas and the Committee has made a determination as to the validity of those objections. Plaintiffs claim that failure to provide such hearings violates the Committee's Rules of Procedure and Guidelines and Due Process standards.

The fact is, however, that plaintiffs have had or will have full and timely opportunity to hearings on their objections to the subpoenas.

*/ The case of Fitzgerald v. Hampton 152 U.S. App. D.C. 1, 467 F.2d 755(1972), relied on by plaintiffs, is clearly distinguishable on its facts. In that case the Court ruled that plaintiff was entitled to a public hearing in regards to a "quasi-judicial" administrative proceeding held to determine his right to his job. The Court noted, however, that different standards apply when the hearing is investigative in nature. In no way can the Committee's investigatory proceedings be considered "quasi-judicial" in nature.

Plaintiffs have already had, in executive session before Chairman Ervin, the opportunity to object to testifying in private session pursuant to the ad testificandum subpoenas. Senator Ervin overruled their objections and several plaintiffs, including Mr. Davis, have now testified in private session and appear to have waived any objections in that regard they might have had.

Moreover, all plaintiffs have had or will have the opportunity in executive session to raise objections concerning the subpoenas duces tecum. At this writing, several plaintiffs, their objections overruled, have submitted materials in response to subpoenas duces tecum, thus apparently waiving their objections in these respects.*/

In the event any plaintiff fails to testify or produce materials pursuant to subpoena, he or she will have the additional opportunity to be heard before the entire Committee before the Committee determines whether contempt proceedings will be instituted.**/

The hearings that all plaintiffs have had or will have in regard to their objections to the subpoenas issued to them have been or will be conducted in full accordance with the Committee's Rules of Procedure and Guidelines. Plaintiffs, in fact, point to no specific provision of these regulations that has been transgressed to their detriment. And since plaintiffs have had or will be afforded full, timely rulings on their objections before any institution of contempt proceedings, the Committee's procedures satisfy Due Process standards.

*/ Mr. Davis, for example, submitted for copying the 1,001 one hundred dollar bills returned to him by Mr. Rebozo. The money was subsequently returned to Mr. Davis.

**/ The facts involving plaintiffs' hearing rights before the Committee are set forth in the affidavit of Samuel Dash, the Committee's Chief Counsel and Staff Director, which is attached to defendants' Statement Of Material Facts As To Which There Is No Genuine Issue.

In summary, plaintiffs' claims, insofar as they involve hearings already had before the Committee, are moot. Insofar as their claims involve hearings that, in accordance with the Committee's Rules and Guidelines, will be held in the future if the need arises, they are not appropriate for judicial decision because no denial of hearing rights has occurred or is threatened.

III. Plaintiffs' Motion for Preliminary Injunction Must Be Denied

It is settled law that a motion for preliminary relief must be rejected if plaintiffs have little chance of success. Embassy Dairy v. Camalier, 93 U.S. App. D.C. 364, 367, 211 F. 2d 41, 43 (1954); Perry v. Perry, 88 U.S. App. D.C. 337, 190 F. 2d 601 (1951); Green v. Kennedy, 309 F. Supp. 1127, 1133 (D.D.C. 1970) appeal dismissed 392 U.S. 956 (1971). As demonstrated above, plaintiffs have no chance of success in this lawsuit. Their motion must therefore be denied. But even if their prospects were more sanguine, preliminary relief would be inappropriate for several reasons.

A motion for preliminary relief must be unavailing unless plaintiffs can demonstrate that failure to grant it will work them irreparable harm. Younger v. Harris, 401 U.S. 37, 47 (1970); Beal v. Missouri Pac. Ry., 312 U.S. 45, 49 (1941); Cline v. Frink Dairy Co., 274 U.S. 445, 452 (1927). We fail to see how plaintiffs at this stage can meet their burden of proving irreparable injury. The statutory determination under 2 U.S.C. §190-1(b) that they requested has already been made. They have had or will have a chance to present their arguments at executive session as to why the subpoenas issued to them are objectionable.*/ They will have the opportunity, if the need arises, to make argument to the Committee as to why contempt proceedings against them should not be instigated. They will have, in any court proceeding resulting from contempt measures, yet another opportunity to argue all legal issues they desire.

*/ It is noteworthy that the Committee sustained objections raised by plaintiff Chester Davis concerning certain items he was required to produce by the subpoena duces tecum issued to him.

The claim that testimony in private, rather than public, session will produce irreparable harm is untenable. The Committee's Rules of Procedure, e.g., Para. 27, prohibit the revelation of evidence taken in private session without a majority vote of the Committee and plaintiffs' counsel has been assured by Senator Ervin that the Committee will impose a stricter regimen than usual to insure that evidence obtained in such sessions is not divulged. In truth, the harm inflicted on defendants if private sessions are disallowed will be far greater than that occasioned plaintiffs if they are not. A fully public investigation into the sensitive matters now under Committee scrutiny would not prove fruitful but would only bring delay and disruption to the Committee's work. In determining whether to grant preliminary relief, the Court must, of course, consider the damage done to defendants if relief is granted. E.g., Dorfman v. Boozer, 134 U.S. App. D.C. 272, 277, 414 F.2d 1168, 1173 (1969); Pelchow & Righter Co. v. Western Printing and Lithographing Co., 112 F.2d 430, 431 (7th Cir. 1940); Love v. Atchison, T. & S. F. Ry. Co., 185 F.321, 331-32 (8th Cir. 1911).*/

Plaintiffs also have not and cannot demonstrate that the public interest demands preliminary relief, a burden they must meet before such process may issue. Yakus v. United States, 321 U.S. 414, 440 (1944); Va. Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937); Va. Petroleum Jobber Assn. v. F.P.C., 104 U.S. App. D.C. 106, 112, 259 F.2d 921, 927 (1958). As noted, the requirement that the Committee's investigation be

*/ If plaintiffs really desire to have their accounts made public, they are at liberty to call a press conference where they can divulge whatever information they see fit. No court injunction is needed to make such a public forum available to plaintiffs.

conducted at open hearings would turn it into a shambles and would thus deprive the public of an orderly revelation of the circumstances surrounding the so-called Hughes/Rebozo affair. Public hearings also might unnecessarily defame the reputations of certain individuals and cause the revelation of national security matters. Such results, we submit, would be contrary to the public interest. In such circumstance, this Court should exercise the discretion vested in it respecting preliminary relief and deny plaintiffs' motion.*/

CONCLUSION

The Courts have long exhibited extreme reticence to tamper with the inner-workings of legislative committees. E.g., Eisler v. United States, 83 U.S. App. D.C. 315, 170 F.2d 273 (1948), cert. dismissed, 338 U.S. 883 (1949);**/ United States v. Fort, 143 U.S. App. D.C. 255, 264, 433 F.2d 670, 679 (1970) cert. denied, 403 U.S. 932 (1971); In Re Application of United States Senate Select Committee on Presidential Campaign Activities, (D.D.C. Miscel. No. 70-73, June 12, 1973) (Sirica, J.). We submit that this Court

*/ Finally, we observe that plaintiffs have made no offer to satisfy the security provisions of Rule 65(c) F. R. Civ. P. We suggest that plaintiffs' request for preliminary relief, which if granted would seriously handicap the Committee's work and debilitate its effectiveness, should not even be considered unless plaintiffs represent that they are prepared to post bond in considerable amount.

**/ In Eisler, the Court noted that a witness is compelled to abide by the procedures prescribed by a Congressional committee and may not set the conditions under which he will testify.

should be quite reluctant to interfere with the Select Committee's procedures, especially since, as demonstrated, they are in full accord with applicable legal standards. Plaintiffs' motion for preliminary injunction should be denied and defendants' motion for summary judgment granted.

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al.,

Plaintiffs,

v.

THE SENATE SELECT COMMITTEE ON
PRESIDENTIAL CAMPAIGN ACTIVITIES,
et al.,

CIV. NO. 2107-73

Defendants

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. On November 29, 1973, the Senate Select Committee on Presidential Campaign Activities unanimously adopted a Resolution pursuant to the provisions of 2 U.S.C. 190a-1(b). This Resolution is included in an excerpt of the minutes of the Committee's executive session on that date that is attached to this Statement of Facts.

2. This Resolution was passed upon representations by staff counsel that the evidence to be obtained from the witnesses enumerated in the Resolution might intend to reflect adversely upon them or others, might involve matters of national security, and might divulge information that, under the Committee's Rules of Procedure, Guidelines, and Authorizing Resolution, is deemed confidential. The staff representations on national security were in turn based on representations made to the staff by Presidential Counsel J. Fred Buzhardt. The representations made by staff counsel are reflected in the minute excerpt attached to this Statement.

3. All plaintiffs to this action have had a hearing before the Committee in executive session concerning their objections to testifying in executive or private session pursuant to the subpoenas ad testificandum issued to them. These objections were overruled by Senator Sam J. Ervin, the Committee's Chairman,

sitting in executive session, and certain plaintiffs have, in fact, now testified before the Committee in private session. See the attached affidavit of Samuel Dash, Chief Counsel and Staff Director of the Committee.

4. Several plaintiffs have already had the opportunity at a hearing before the Committee in executive session to raise their objections concerning compliance with the subpoenas duces tecum issued to them. Certain objections have been overruled and certain objections sustained. Several plaintiffs have now complied in whole or in part with the subpoenas duces tecum issued to them. Other plaintiffs who desire to object to the subpoenas duces tecum issued to them will have full opportunity to do so before the Committee sitting in executive session. See Dash affidavit.

5. All plaintiffs, if the need arises, will have the further opportunity to present their objections to the subpoenas to the full Committee in executive session before contempt proceedings against them are initiated by the Committee. See Dash affidavit.

6. Under the Rules of Procedure and Guidelines of the Committee, all testimony and evidence received in private session is deemed confidential until released to the public by majority vote of the Committee. See, e.g., Rule 27 of the Committee's Rules of Procedure, which are attached hereto.

Respectfully submitted,

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Eugene Gressman
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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al.,)
Plaintiffs,)
))
v.)
THE SENATE SELECT COMMITTEE ON) Civ. No. 2107-73
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants)
)

AFFIDAVIT OF SAMUEL DASH

Samuel Dash, being sworn, deposes and says:

1. I am Chief Counsel and Staff Director of The Senate Select Committee on Presidential Campaign Activities. I make this affidavit on the basis of my own knowledge and on the basis of information provided me by the Staff of the Select Committee.
2. After an exchange of telegrams with Mr. Chester Davis over a period of about two or three weeks, I met with Mr. Davis in my office along with Fred Thompson, Rufus Edmisten, Terry Lenzner, James *RONALD D. ROTUNDO* Hamilton, and ~~_____~~ on Thursday, November 29, 1973, to discuss the procedures by which Mr. Davis could raise his objections to the subpoenas duces tecum and ad testificandum that had been served upon him and employees of his client, the Summa Corporation. It was explained to Mr. Davis that the time to raise objections is when the witness appears pursuant to the subpoena. It was agreed at that time to allow Mr. Davis to present his objections to the Chairman of the Senate Select Committee, Senator Sam J. Ervin, Jr., on Monday, December 3, 1973, when the witnesses were produced for testimony pursuant to their subpoenas.
3. Prior to this occasion, it is my information and belief Mr. Davis had instructed the individuals subpoenaed by the Senate Select

Committee not to comply with their subpenas. Therefore, on November 29, 1973, Senator Ervin found Dave Gribben out of compliance with his subpoena returnable on that day. On the following day, November 30, 1973, both Jack Cromar and Walter Glaeser were found out of compliance by Senator Weicker and Senator Talmadge, respectively, when they did not appear.

4. However, Mr. Jack Real did appear for a staff interview on Saturday, December 1, 1973, in compliance with the subpoena that was served upon him. He stated at that time that he had no documents listed in the subpoena.

5. On Monday, December 3, 1973, Mr. Davis, accompanied by Jack Cromar, Richard Danner, Carol Dunkle, Walter Glaeser, Dave Gribben, Robert Morgan, Ralph Winte, and Robert Wearley appeared at executive session before Senator Ervin at approximately 3:15 p.m. All of the above-named witnesses, including Mr. Chester Davis, were sworn in by Senator Ervin pursuant to their subpoenas. At this time, Mr. Davis was given a full opportunity to present the witnesses' objections to testimony being taken in private sessions. Senator Ervin denied Mr. Davis' request to raise his objections in a public hearing and denied his request that the witnesses he represents be allowed to testify only in public session, citing the Resolution passed on November 29 by the Select Committee and the Rules of Procedures and Guidelines of the Committee. Senator Ervin then proceeded to take testimony from certain of the subpoenaed individuals.

6. The first witness called was Mr. Chester C. Davis. Mr. Davis again raised a series of objections before Senator Ervin, and Senator Ervin ruled on these objections pursuant to the Rules of the Senate

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Select Committee on Presidential Campaign Activities. At all times during this hearing, Mr. Davis was accorded his full rights and privileges under the Rules of Procedure and Guidelines of the Senate Select Committee. Because Mr. Davis's subpoena had a return date of December 4 at 2 p.m., Senator Ervin agreed that Mr. Davis should not be called upon to comply fully with his subpoena until the following day.

7. Following Mr. Davis's abbreviated testimony, Mr. Walter Glaeser was called to give testimony. Again, Mr. Chester Davis was given the opportunity to raise similar objections to the ones that he had already made in general and with specific reference to his own appearance. Again, Mr. Davis received rulings from Senator Ervin, in accordance with the Committee's Rules and Guidelines. Mr. Walter Glaeser then testified that he had not complied with his subpoena on November 30, 1973, at the instructions of Mr. Davis. Because of the lateness of the hour, Mr. Glaeser's testimony was abbreviated, and it was agreed that he would resume his testimony on the following day at 5 p.m. after Mr. Davis's appearance. Mr. Glaeser did comply with the subpoena duces tecum by producing certain items called for by the subpoena. He then stated that he had no other items called for by the subpoena.

8. Following the adjournment of Mr. Glaeser's testimony, Mr. Gribben was called for testimony. He was asked his name and occupation and then agreed to respond fully to any and all questions

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that would be put to him by the Senate Select Committee. Mr. Gribben testified that he had not complied with his earlier subpoena at the directions of Mr. Davis. At that point, Mr. Gribben's subpoena was adjourned until 11 a.m. on Tuesday, December 4, 1973. Mr. Davis again raised objections to Mr. Gribben's testimony similar to those he had raised before, and was given a full hearing on all of his objections. Senator Ervin ruled that Mr. Gribben should respond fully to the subpoena served upon him.

9. Subsequently, Mr. Robert Morgan's subpoena was adjourned until Wednesday, December 5, at 10 a.m.; Mr. Cromar's subpoena was adjourned until 3 p.m. on Wednesday, December 5; Mr. Danner's subpoena was adjourned until 10 a.m. on Wednesday, December 12; Mr. Wearley's subpoena was adjourned until 10 a.m. on December 13; Ms. Dunkle's subpoena was adjourned until 2 p.m. on December 13; and Mr. Winte's subpoena was adjourned until Friday, December 14 at 10 a.m.

10. On Tuesday, December 4, 1973, at 11 a.m., Mr. David Gribben was sworn in again at an executive session by Senator Lowell Weicker, and, at this time, Mr. Davis again raised the objections that he had raised before Senator Ervin the previous day with respect to the testimony of Mr. Gribben. The objections were overruled by Senator Weicker. Mr. Gribben gave testimony in executive session until approximately 1:15 p.m. on Tuesday, December 4, 1973. He acknowledged custody of some files called for by the subpoena, but did not produce those files at that time because of objections raised by his counsel, Mr. Dubin. No ruling was sought at this time because of the absence of a presiding member of the Committee.

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11. On Tuesday, December 5 at 2 p.m., Mr. Davis again had the opportunity to present his objections at an executive session of the Senate Select Committee. In attendance at this session, held at Room S-143 of the Capitol Building, were Senator Ervin, Senator Weicker, and Senator Montoya. On this occasion, Mr. Chester Davis produced certain items called for in the subpoena issued to him for that time, and proceeded to raise a variety of other objections relating to the scope of the duces tecum aspects of the subpoena issued to him. Mr. Davis had a full and complete opportunity to present all of his objections to the Senate Select Committee at this time. Mr. Davis received certain rulings, some favorable to the positions that he asserted (e.g., narrowing the scope of the subpoena duces tecum). Other objections he raised were denied. Because of the variety of objections raised by Mr. Davis, the subpoena again was adjourned to Thursday, December 20, 1973, at 10 a.m.

12. Mr. Glaeser resumed his testimony before Senator Weicker, and Senator Ervin at 5 p.m. on December 4, 1973. Davis was again given a full hearing respecting his objections to testimony pursuant to the Rules and Guidelines of the Senate Select Committee. Mr. Davis's objections were not sustained and Mr. Glaeser continued his testimony. His testimony was completed about 6:30 p.m. on that day.

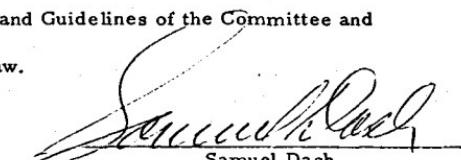
13. On Wednesday, December 5, Mr. Davis notified me that he was filing papers for a Temporary Restraining Order in Federal District Court, and that a hearing was scheduled at 9:45 a.m. before Judge Robinson. I agreed with Mr. Davis that we would postpone the appearances of both Mr. Morgan and Mr. Cromar until he had completed his business with the District Court, but that such appearances would be required following the argument.

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14. Mr. Davis appeared at the Select Committee offices along with Mr. Robert Morgan and Mr. Jack Cromar at about 2:15 p.m. on Wednesday, December 5, 1973. Mr. Davis indicated to me that he was planning to make a request at executive session that the hearings for these two individuals be postponed until next week because of his appearance on Thursday, December 6, 1973, before a grand jury in Las Vegas. I presented Mr. Davis's request to Senator Lowell Weicker, and Senator Weicker agreed that as a courtesy to Mr. Davis and in order not to inconvenience him unduly, we would be amenable to adjourning the subpoenas. The hearings were subsequently postponed until Tuesday, December 11, 1973, at 10 a.m. and 2 p.m. respectively.

15. As the record demonstrates, Mr. Davis has been given a full hearing on all his objections concerning the testimony of a witness and the production of materials pursuant to subpoena by the witness before the presiding senator at executive session at the time when the witness appeared pursuant to his subpoena. In the future, Mr. Davis will continue to be given a full hearing on all of his objections to subpoenas in accordance with the Rules of the Senate Select Committee. Furthermore, after receiving adverse rulings to his objections, Mr. Davis and the witnesses he represents elected to comply with the subpoenas and produced documents covered by the subpoenas and gave testimony in executive session.

16. Before any contempt proceeding is initiated by it, the Committee will allow Mr. Davis a hearing before the Full Committee in accordance with the Rules and Guidelines of the Committee and established principles of law.



Samuel Dash

Washington
District of Columbia

Sworn and subscribed before me this 7th day of December, 1973.
Marie Leneau
Notary Public My Commission Expires 10/31/78

November 29th, 1973, Executive Session

Excerpts from the Minutes of the Meeting of the Select Committee on passage of Resolution to require certain witnesses to appear in Executive Session.

Senator Talmadge moved that the Committee adopt the Resolution presented by Senator Ervin:

Senator Weicker	
Senator Talmadge	
Senator Inouye	Unanimous Aye
Senator Ervin	
Senator Montoya (by proxy)	

The Resolution is as follows:

RESOLUTION

"It is hereby this 29th day of November, 1973, by the Senate Select Committee on Presidential Campaign Activities

RESOLVED:

The Senate Select Committee is empowered by S. Res. 60, 93rd Congress, 1st Session (Feb. 7, 1973) to investigate "illegal, improper or unethical activities" relating to the presidential campaign and election of 1972. Because of the nature of its investigations, the testimony and evidence the Committee receives tend generally to reflect adversely on the character or reputation of the witnesses testifying or others and normally divulge matters that, under the Committee's Rules or Procedure, Guidelines and/or Authorizing Resolution, are deemed confidential. Upon consideration of these factors and upon consideration of the nature of the evidence the individuals herein enumerated are expected to produce, it is the determination of this Committee that the testimony of Chester Davis, Richard Danner, Ralph Winte, Dave Gribben, Jack Cromar, Walter Glaeser, Roy Crawford,

Robert Morgan (custodian of records of Summa Corporation), Robert Worley, Nadine Henley, Jack Real, Carol Dunkle, Vince Kelly, Margaret Sullivan, and the Presidents or custodians of records of the Desert Inn, Landmark, Frontier, Sands, and Castaway hotels may tend to reflect adversely on their character or reputation or the character or reputation of other individuals and may divulge matters relating to the investigations of this Committee that, under its Rules of Procedure, Guidelines, and/or Authorizing Resolution, are deemed confidential. It is also the determination of this Committee, based on its expectations as to the nature of certain testimony these witnesses may give, that their testimony may relate to a matter of national security. The Committee thus determines that the testimony of these witnesses should, at this stage, be taken in Executive Session. The Committee, however, recognizes that these witnesses retain all rights afforded witnesses under the Committee's Rules of Procedure, Guidelines and Authorizing Resolution."

The following statement by Terry F. Lenzner, Assistant Chief Counsel with responsibility for investigating the so called Hughes-Rebozo affair, has been placed in the record to augment his oral representation to the Committee.

Statement of Terry F. Lenzner to Select Committee on Presidential Campaign Activities.

The testimony of plaintiffs in this matter may relate to a matter of national security. First, we have been investigating the financial and business relationships of F. Donald Nixon to a number of people including one John Meier while the latter was receiving compensation from the Hughes Tool Company. It is our information that Mr. Nixon was the subject of electronic surveillance because of these relationships and that particular concern was focused on a trip Mr. Meier, Nixon and others made to the Dominican Republic in 1969. We have been further advised by counsel to former White House aides, Ehrlichman and Haldeman, that they have been directed not to answer any questions related to this area on national security grounds, among others. Mr. J. Fred Buzhardt, Counsel to the President, has reaffirmed this instruction and referred specifically to the President's response to a question at his Disneyworld Press Conference. We intend to inquire of plaintiffs and other witnesses into this area in executive sessions to avoid the possibility of alleged national security information being made public.

In addition, testimony of plaintiffs may tend to reflect on their character or reputation and on the character or reputation of a number of other individuals including but not limited to F. Donald Nixon, Edward Nixon, John Meier, Robert Maheu, C. G. Rebozo, Tony Hatsisi, Howard Hughes, Roy Crawford and Nadine Henley. We intend to question plaintiffs about information concerning themselves, the above named individuals and

others relating to possible illegal and unethical behavior, including but not limited to illegal campaign contributions to the 1972 Presidential campaign, and allegations of bribery, conspiracy and improperly influencing government decisions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, et al.,

Plaintiffs,

vs.

SENATE SELECT COMMITTEE etc.,
et al.,

Defendants

) Civil No. 2107

Monday, December 10, 1973

Washington, D.C.

Hearing on Motion for Preliminary Injunction before The
HONORABLE AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

CHESTER C. DAVIS, Esq.
For the Plaintiffs

RNALD D. ROTUNDA, Esq.
JAMES HAMILTON, Esq.
For the Defendants

DOYNE W. SPENCER
Official Reporter
4806 U.S. Court house
Washington, D.C. 20001

P R O C E E D I N G S

THE DEPUTY CLERK: Richard Danner, et al., vs.
the Senate Select Committee, and so forth, et al., Civil Action
2107-73.

THE COURT: As the Court understands with respect to this matter, the parties have agreed to argue both the motion for a preliminary injunction and the motion for summary judgment that has been filed. Is that correct?

MR. HAMILTON: Judge Robinson, that's correct. I would like to say that if Your Honor is not disposed to get rid of this case today, that I would like to file a piece of paper disputing some of the assertions of fact in the plaintiffs' statement of material facts as to which there is no genuine issue, because I think there are some misstatements of fact in that document.

MR. DAVIS: If Your Honor please--

THE COURT: Are you ready to assert them for the record?

MR. HAMILTON: Yes, sir, I can assert those for the record.

THE COURT: Well, I'll hear Mr. Davis.

MR. DAVIS: On that issue, Your Honor, it is our position that insofar as a motion to dismiss the complaint is concerned, I submit it would be inappropriate to address ourselves to that question until after a determination has been

made on those questions.

Procedurally, what I am seeking to bring on today was both our motion for a temporary injunction as well as a motion for a declaratory judgment seeking relief in the alternative. I was informed by my associate that it should be called a motion for summary judgment, and I have construed the opposing papers of Mr. Hamilton as being primarily addressed to the relief we were seeking at this time, rather than as a serious effort to bring on for argument at this time the propriety of a dismissal of the complaint in the event we should fail to convince the Court that now is the time to give us some relief.

THE COURT: Well, with respect to the motion for summary judgment, the defendants cannot be foreclosed from the opportunity to submit a counter-statement as to the facts allegedly not in dispute. And if there are factual disputes, then we have to determine whether or not there can be partial summary judgment or any summary judgment relief.

Let's address ourselves first, then, to the relief requested with respect to the preliminary injunction.

MR. DAVIS: As I see it, Your Honor, today there is before the Court, I would call it an application by the plaintiffs for judicial relief of some kind at this point, whether it be in the nature of a temporary injunction or in the nature of a declaration of my rights and those of the plaintiffs whom I represent.

I think the Court focused on the issue that this application involves when it pointed out the last time I was here seeking a temporary restraining order that the real issue is not the power of the Court to review the legality or illegality of the conduct of the defendant subcommittee. Unquestionably, the Court does have that power.

As I understand, the question at issue here today is whether or not the situation under our circumstances is ripe for the exercise of that power at this time by this Court.

The last time I was here the Court asked me if I knew of a specific case involving the issuance of a restraining order on a congressional committee. I think I indicated to the Court the last time that I did not know of one. I am a little more familiar with the cases in this area today than I was then, and I must say that I have not found what we used to call in law school a "red cow" case-- in other words, a case having the same facts as we have here.

But I respectfully submit, Your Honor, that all of the cases that I have looked at, including all of the cases cited by Mr. Hamilton, clearly indicate, if I understand what is said in those opinions, that this is the very kind of a situation where it is appropriate for the Court in the exercise of its judicial power and redress the injury that is imminent on the citizens by reason of the illegal conduct in which the defendant has engaged in and are threatening to engage in.

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If this situation, if the circumstances here present do not fall within the meaning of the law as expressed in all those cases, then I respectfully submit to the Court no case ever will, and the views and opinions expressed by some of the most eminent jurists as reflected in those cases are just empty words.

We must bear in mind, first of all, that here we have a situation where there is a specific statutory mandate or requirement controlling the activities of this subcommittee and the issue is: are they complying with the law or are they not. And the fact they may happen to be elected senators or congressmen has nothing to do with it.

If there is a difference of opinion between the parties as to how the law should be interpreted, I don't know of any other place to come but here. And if there is a finding by this Court of an apparent or probable violation of law, then the Court should act if in weighing the probable harm to the plaintiffs against the probable harm to the defendants indicates that irreparable injury is apt to occur.

On that issue all of the cases which have been cited in the papers, and particularly the cases cited by counsel for the subcommittee, as I read them, at least, clearly indicate that now is the time to stop illegal conduct and to protect the rights of the plaintiffs where, I submit, nothing harmful can possibly happen to ~~the~~ subcommittee by having an open

hearing.

It is not a question here, as involved in many of the cases, where the person being called to testify before a legislative committee is seeking to delay or is anticipating an adverse ruling or is seeking to cross-examine witnesses in an investigative proceeding with a disruptive effect.

Here we have a situation where there is a clear legislative mandate with a clear requirement under the very rules of procedure this committee has adopted under the enabling resolution of the Senate. There has been a determination, allegedly, in compliance with those rules. I dispute that, but I will for the purpose of this argument assume that the determination has been made by the subcommittee purporting to adjudicate the rights of the plaintiffs I represent and my personal rights.

Under those circumstances, I submit that there is nothing to wait for. And if in fact this Court has the power to view the legality or illegality of the procedures here being followed, I am at a loss to understand what it is that justifies any delay in the review by this Court of the conduct of the defendants.

I do find, I do understand, the reasons in the other situations where the Court found that there had not yet been a determination by the legislative subcommittee and desired to permit the subcommittee itself to pass upon objections that

might be raised at the time that a witness was confronted with a particular question and who wants to refuse to answer.

That situation may or may not develop in connection with any particular question that is put to these witnesses. But it has nothing to do with the issue as to whether the hearing should be open or closed.

Now, I would like to point out, if I may, the nature of the irreparable injury that we are discussing in more dramatic terms.

Your Honor will recall that when I was here last, one of my handicaps was the fact that I had not been provided with a copy of the transcript of the secret proceedings which had theretofore taken place. Your Honor will recall that pursuant to the insistence of the staff of the committee and the rulings of the chairman of the committee, I was required to appear in executive or secret session in order to comply with the rulings of that committee. So I did. I had no alternative.

And there I delivered to the committee something which they had subpoenaed, namely, the \$100,000 in currency. Now, that was a secret session. By the time I arrived at my hotel, I could listen on the TV to statements to the effect that, in a moment of anger, I dumped some money in front of the chairman of the committee and said, "here's your god damned money." It was described as, "Here's your g-d-money."

That appeared in practically ever newspaper in the

country. Following those hearings, I had to go to Nevada to appear before a grand jury there, and there I was met with these same headlines, and people stopped me on the street and saying, "Did you really say that?"

Quite frankly, Your Honor, I didn't think I had said that. In fact, during the course of those hearings, which were attended by two senators -- Senator Ervin and Senator Weicker, who from time to time would leave the room and return-- Senator Weicker said to me, "The reporters were asking me if you had really said, 'here's your god damned money,' and I told them I didn't quite remember what you had said."

Now, what is the truth? I would like to refer Your Honor to the transcript of that proceeding which was subsequently made available to me, and I must say, in fairness to all concerned, that Senator Ervin expressed some surprise and annoyance that I had not been furnished a transcript of the prior executive committee proceedings, as he thought he had ordered.

But be that as it may, I would like to refer Your Honor to page 4 of the transcript of the hearing, which took place on Tuesday, December 4th, in which I was required to appear as a witness. I am merely interested solely in referring to the portion that dealt with this delivery of the money.

I started off by saying: "I don't intend to have

any excuses, Mr. Chairman, but I also would like the record to reflect that this morning I was denied a record of yesterday's procedures, which, of course--"

And then Senator Ervin breaks in: "Mr. Davis, the question first is whether you are going to comply with the subpoena and produce this \$100,000 before the committee.

"Mr. Davis. I intend to comply with every ruling that the committee makes whether or not--"

And I was interrupted again by Senator Ervin: "Well, are you going to comply today?

"Mr. Davis. Yes, sir. If you want to destroy my evidence and not give me an opportunity to be heard, I'll give you the money right now.

"Senator Ervin. Wait a minute, Mr. Davis. I'm going to give you an opportunity to be heard. But I want to know whether you are going to comply.

"Mr. Davis. I would like the record to show that I hand you, Mr. Chairman, the money that you have been seeking, and I want the record to show that I don't have a shred of evidence that this money is in any way related to the 1972 campaign.

"Now, maybe the committee staff has some information that I do not have, but there is not a shred of evidence in my possession, or control, sir, which indicates that this money has any relationship whatsoever to the 1972 campaign.

And I respectfully submit that I would appreciate it if this committee would give me a record so I can go to Court on the basis of a transcript other than on my recollection of the ruling.

"Senator Ervin. Well, I hope to give you the transcript pretty quick."

Now, Your Honor, that is what happens when you do not have open hearings, and you permit the staff to go out and leak what they please to the press based upon these executive secret sessions, for whatever their purpose may be.

Now, I claim, Your Honor, that I have been severely injured, but I have no redress. It has happened. I can't go to everybody I know and say, "I never said here's your god damned money."

In their opposing papers, they suggest that because I have appeared, I have waived something. Well, it is true I can't change what has taken place, but I'm not finished. They want me to return on the 20th of December. I presume they have some more questions.

But they want to do it in secret. And I submit that I have a right to an open hearing, and I submit that the statute requires them to give me an opening hearing if my constitutional rights do not give me that right.

Now, let's address ourselves to the cases which are supposed to control this situation.

As I said earlier, I do not have a red cow case, but I certainly have cases which, if the opinions mean anything, they mean that I'm entitled to my release now.

Insofar as the right to enjoin is concerned, I was interested to note the Hannah case, which, of course, involved an entirely different issue than here. That was a case, as Your Honor will recall, where individuals who were being accused of depriving others of their civil rights insisted that the legislative committee conducting hearings in Louisiana, that they were entitled to be informed of who their accusers were, and, also, were insisting upon the right to cross-examine. There was no question there about open hearings.

But on the power to enjoin, I think the opinion of the Court is interesting in that regard when it referred to, as applicable to that situation which did involve the Legislative Committee, it referred to -- I am referring to the Supreme Court of the United States, of course, of Green vs. McElroy where the Court said: "That required a preliminary determination as to whether Congress specifically authorized the commission 'to adopt rules for investigation which would deprive parties investigated of their rights of confrontation and cross-examination and their right to be apprised of the charges against them.'"

The Court found that Congress had not so authorized the commission and an injunction was, therefore, issued.

Now, it is true that in the Hannah case the Supreme Court struggled mightily with a serious dissent as to whether or not -- they found, of course, in that case, that Congress had authorized procedures for investigation by a legislative committee without giving the right to cross-examine.

That is not our situation here. But even on that question, the dissent was very much concerned about the deprivation to anyone of what we regard as the normal substantive rights of being confronted by an accuser, the right to cross-examine witnesses testifying contrary to one's interests, or what have you.

And I was interested in the comments of the Court which dealt with that due process question. It said: "Due process is an illusive concept. Its exact boundaries are undefinable, and its contents varies according to specific factual context. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of the individuals, it is imperative that those agencies use the procedures which have traditionally been associated with judicial process."

Now, the relevancy of that to our situation, Your Honor, is that we have had here some determinations made, which so far as I am concerned, are binding determinations when they heard my objections in secret private hearings.

The Court concluded that the right to cross-examine

was not available in those kind of investigative hearings. But at the same time, it pointed out, if I can find the place, that the concept of being deprived of cross-examination in investigative and non-adjudicative proceedings is not so unusual, and the reference was made to the grand jury procedure.

I think some reference was made to the grand jury procedure the last time I was here.

The point that is overlooked, in our situation, sure, the grand jury does function in private, but under the constant supervision of the Court. A witness who appears before a grand jury who feels aggrieved at the manner in which he is treated, he has the right to immediately go to a judge, who will protect his rights.

I am quite confident, Your Honor, that it is not being suggested here that the solution to our problem is to be bound by an analogy to the grand jury procedure.

In fact, at times it seems as if counsel for the subcommittee would like to liken himself or themselves to an administrative proceeding and procedures. Speaking of investigation by administrative bodies, reference is made to the Roven case.

In the Roven case, of course, we were dealing with a statute in Ohio, which pursuant to Ohio's constitutional provisions, as I understand it, permitted a fire marshal to investigate the causes of a fire. And there the question was

whether those called to testify or to reveal whatever information they possessed to the fire marshal, whether they were entitled to advice of counsel, and were entitled to be present when other witnesses testified.

And the Supreme Court, badly divided, upheld the right of the Ohio statute, under the Ohio statute, I should say, to permit the fire marshal to conduct those kinds of hearings.

Now, of course, that is not applicable here, because here we have the statute which requires open hearings. But the reasoning of the Court is interesting and is applicable here because if what they are doing is conducting some kind of secret administrative hearings, then I submit that the Fitzgerald case applies. In the Fitzgerald case, you will recall that the Civil Service Commission attempted to have non-open hearings to pass upon the circumstances under which an individual covered by Civil Service had been terminated.

THE COURT: Mr. Davis, there is no possibility of construing these hearings as administrative hearings. There is no possibility of that construction.

MR. DAVIS: All right, Your Honor, I agree.

THE COURT: And cases that deal with administrative due process are not relevant. We are dealing with a legislative hearing conducted by a duly constituted special subcommittee of the Senate of the United States. That's the starting point. And cases that have to do with administrative process are not

relevant.

MR. DAVIS: I couldn't agree with you more, Your Honor. But the issue is, as I understand it, whether or not this Court at this time will exercise the power, which I assume everybody agrees it has, to review the legality of the manner in which these legislative hearings are being conducted.

That presumably is where there is a difference of opinion between us and counsel for the subcommittee.

THE COURT: Oh, I think we stated it more accurately in our discussions on the temporary restraining order. It's not whether the Court is foreclosed from reviewing whether or not the legislature has complied with the statutory mandate. It's when it may do so, when it may do so.

MR. DAVIS: Well, in connection with when, Your Honor, perhaps, the comments of the Supreme Court in its opinion, not dealing with the issues there before it, may be germane to the thinking, when the Court said nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect or loyal friend or even disinterested by-stander. And the footnote of that reads: "It seems wholly improper to 'wait and see' in each case whether a witness has been coerced or tricked in giving involuntary statements under secret interrogation, and then to set aside convictions which may be based on such statements."

I submit, Your Honor, that the point I am arguing

is that there is no conceivable justification in our situation to say: "Refuse to testify in a secret session, allow them to cite you for contempt, and then go to Court and have determined whether or not you are entitled to an open hearing or a closed hearing."

That, frankly, Your Honor, makes no sense whatsoever to me. I cannot see any conceivable justifiable reason for reaching that conclusion.

Let us examine the reasons advanced in the memorandum submitted to us by the counsel for the committee.

They talk about the separation of powers. I find that completely irrelevant. We have a statute here. If they don't like the provisions of the statute, they ought to go to the Congress from which they come and get it changed.

They talk about disrupt and delay. I don't understand how having an open hearing disrupts or delays anything.

This is not a situation such as was involved in some cases where I was asserting the right to cross-examine witnesses appearing there.

They talk about the public interest. Well, they talk about the public interest whenever they feel like it, because most of the time they say it is important that the public be informed. But whether it is important that the public be informed or not be informed, I respectfully submit that every witness who is called to appear before a body, unless there is

a specific prohibition to a public hearing, and then I don't believe that would be constitutional without good and sufficient cause -- is entitled to an open hearing for his own protection, if nothing else.

It may be that they can't brow beat me in a secret hearing. But that's not the issue.

The issue is what are the rights of the person who appears.

I cannot conceive of any situation, Your Honor, where the situation is not more ripe for judicial review. It could be that if I had not obtained a ruling by the committee denying me an open hearing, that then we might have been in the confusing situation of, well, why don't you appear and see how the committee will rule on your request or demand for an open hearing.

But I went through that process. That's what brought about the injury we suffered to date, because I felt that before I was in a position to appear before this Court, I had to obtain a determination by the committee as to whether or not they would abide by the requirements of the Congress.

Now, the suggestion is made, well, maybe if the statute applies, we are complying with it because on a particular day we hastily adopted a resolution, which they claim supports the exercise of the right, I say the privilege, the privilege of having a closed session whenever the testimony of the

witnesses might cross the line of national security, the rights of the witness or the rights of others.

Well, Your Honor, the fact here is, and that is why I am burdening the Court with the transcript of the hearings that have been held to date, notwithstanding that resolution of determination, there was nothing in my testimony that involved any of those questions, to date, and none of the testimony that they took from Mr. Gribben and none of the testimony that they took from Mr. Glazer, all people identified in that resolution.

I respectfully submit, Your Honor, that the way you would accommodate the rights of all concerned is to insist on open hearings, and if, as, and when it is established in those hearings that the witness knows something in an area which falls within the provisions of the statute, then retire into executive session with respect to that portion of the testimony.

The thing that makes it a little unusual in this case, we are insisting in telling them what we know. We are telling them we don't know anything in certain areas. But they want to imply that we do, and I say, all right, we will appear, and we will testify.

If our rights are not determined now, when will they be? I submit that we are confronted with a situation where we all recognize we have those rights for them to be determined. And I respectfully submit, Your Honor, that the examination of the cases before us, admittedly, not a red cow case, all clearly

indicate, all the principles, all the statements in both cases indicate not only that we have a very important right to protect and that we are entitled to the protection of the Courts, but, also, I submit they indicate that there is no conceivable justification for not making that determination at this time. And if they wish to produce some more to support their position, it's up to them.

But so far as I know, there is no issue of fact between us as to the rights we are attempting to adjudicate at this time, none whatsoever. It is a simple question of what the law is. I find nothing in the cases which indicate that this Court should be reluctant to exercise its power of enjoining or restraining illegal conduct.

At the same time, I'm quite confident that if this Court were to say and declare these are the rights of these witnesses in these circumstances, I am quite confident that the committee would observe that declaration, and I think my rights would be protected by their own determination.

And, frankly, to me, today it is much relief, so far as I am concerned, for the Court is the only institution capable of determining what the law is, to decide what our rights are so that the committee may act accordingly.

I do not recognize under any concept, theory of separation of powers or anything else, that it is the duty or function of the committee to construe the statute and to

determine for themselves the legality of their own conduct.

I submit that function is to be performed by the Courts.

Whatever additional time the Court thinks I am entitled to, I would like to sit down and reserve it for answering whatever explanation Mr. Hamilton may give to educate us as to why it would be harmful, disruptive or delaying or interfering with the investigative process to permit whatever they are doing to be done openly.

MR. HAMILTON:: May it please the Court, my name is James Hamilton. I am the Assistant Chief Counsel for the Senate Select Committee on Presidential Campaign Activities.

Plaintiffs' basic claim in this litigation is that they have a right to public testimony before the Select Committee, and that they do not have to submit to private interrogation.

Your Honor, as I understand this claim, it's based on three grounds.

First of all, they claim they have a right under 2 USC Section 190A-1B to public testimony.

Secondly, they claim this right under the due process clause of the Fifth Amendment.

And, thirdly, they assert that their right to freedom of speech under the First Amendment allows them to testify in public.

It is the defendants' position that the plaintiffs'

motions, their motion for preliminary injunction and motion for summary judgment, should be denied, and, furthermore, that our motion for summary judgment should be granted and this case dismissed.

I think it is noteworthy in regard to our motion that Mr. Davis has not disputed any of the material facts which we have listed in our statement.

Now, our first ground for dismissal is that this suit is barred by the speech and delay clause of the Constitution.

It is clear from the Gravel case, from the case of Doe vs. McMillan and from the Servicemens Fund case, that the speech and debate clause generally speaking protects conduct that comprises purely legislative activity, even if that conduct in some other context would be unconstitutional or otherwise illegal.

Now, we can perceive of no action that more clearly constitutes pure legislative activity than a decision by a legislative committee whether or not to hold its hearings in public session or to hold them in private session, and we feel that the actual holding of the hearings must be considered pure legislative activity.

I think that the Gravel case, the Brewster case, the Doe case, and the Annuncio case relied on by plaintiffs in their brief make it plain that a legislative committee's activity, in the conduct of its legislative hearings, is the

type of pure legislative activity that the speech and debate clause was intended to protect.

In their brief plaintiffs seek to escape the strictures of the speech and debate clause by use of the ~~say~~ Servicemens' case. But I think under that case properly read they can find no solace.

The Court in Servicemens found that the House Subpoenas in question would violate the plaintiffs' First Amendment rights of freedom of association and would thus constitute an unlawful invasion of privacy.

Now, this finding, the finding in Servicemens, allowed the Court there to fit the case into a specific exception to speech and debate immunity that was carved out in the Gravel case.

In Gravel the Supreme Court had said that a member of Congress would not be immune from suit if he had invaded the privacy of a citizen in a legal fashion. Such conduct, the Court in Gravel said, would not be essential to a legislature.

Now, Your Honor, in this case we have no invasion of privacy. Plaintiffs here have no objections to testifying. Their only objection is to the forum where they will testify. And, as I said, we can hardly think of conduct, in the words of Gravel, that is more essential to legislating than the decision whether or not to have public or private hearings and the implementation of their decision.

Furthermore, unlike the decision in the Servicemens case, the situation in that case, plaintiffs here have an alternative way of challenging the conduct they complain of. That is, through contempt proceedings. And if contempt proceedings eventuate, this Court will have full opportunity to rule on the issues the plaintiffs now raise. And for that reason, we see no reason for the Court to interfere at this juncture.

I would submit to the Court that if the speech and debate clause has any force at all, it should apply in this case, just as Judge Green held that it applied in the case of the National Committee for Fairness to the President. As Your Honor knows, Judge Green dismissed that case brought against this Select Committee, in part, on speech and debate grounds.

But, Your Honor, even if the defendants in this case were amenable to suit, this case must fail because their three theories of relief -- the statutory theory, the due process theory, the First Amendment theory, -- are all untenable.

The plaintiffs are entitled to no relief under the statute, because the committee has already made the determination specified in the statute that its investigatory hearings should be made in private.

As Your Honor knows, this resolution is attached to our statement of facts, as to which there is no genuine issue. Basically, it reaffirms that private hearings are required here

because the testimony adduced may reflect adversely on certain individuals and may involve a matter of national security.

I think it is important to point out that the statutory requirement is in terms of "may," the testimony may have that effect. It is not in terms of "must." It does not say that the testimony must have that effect. And, clearly, the statute gives the committee considerable discretion as to how and on what basis the statutory determination should be made.

Now, this determination by the committee was based on representations by staff counsel, and these representations are also attached to our statement of facts.

I think it is significant that the representation concerning national security was based on a statement by the President's Special Counsel, Mr. J. Fred Buzhardt, and I think it's also significant that the issues raised by the staff representation are, in fact, are being inquired into at the private sessions conducted with the plaintiffs.

Now, I would say with all deference, Your Honor, that in light of this background, that Mr. Davis' assertion that this resolution passed by the Senate Select Committee is a fraud on the public, must be dismissed by this Court as imprudent advocacy.

In any event, I don't think this Court should go behind the resolution of the committee to determine the committee's motives in passing it.

In many cases, the Eisler case that we have cited, the Annuncio case that plaintiffs cited, support the proposition that legislator's motives for a legislative act may not be questioned. Legislators should not be put to the test of proving why they entered into a specific legislative act.

I think it is now the case, now the state of the law in regard to substantive due process, that legislators clearly must not prove the reasons for their legislation.

Now, there is no more merit in plaintiffs' contention that the due process clause gives them a right to public hearing. As the Court knows the committee's hearings are, essentially, investigative hearings. They are not judicial in nature. And I believe that it is settled law that different due process standards apply to a legislative investigative hearing than to a judicial proceeding of some sort where the rights of the parties are adjudicated.

To give just two case examples, I believe the Hannah case and the Fort case cited in our brief establish this proposition. And the reason is that strict adherence to judicial due process standards would unduly complicate and disrupt an investigative proceeding.

Now, let's examine for a moment the principal case relied on by the plaintiffs where a public hearing was ordered.

This was the administrative case of Fitzgerald vs. Hampton. That case, clearly from the opinion, involved a

this claim is simply not true, and I think the history of the committee demonstrates that there are many pieces of highly confidential information that are not leaked to the public.

I can give you one example, Mr. Butterfield's testimony on the tapes was kept in total confidence until Mr. Butterfield appeared on the stand before the committee.

Moreover, if the plaintiffs really want to make their accounts public, they need no Court injunction. They can call a news conference for this purpose. As Your Honor knows, there are plenty of newsmen and plenty of cameras right outside the court house that I would imagine would be available for Mr. Davis if he wants to go out there and give his full story about the matters we are inquiring into.

I would suggest that the defendants would be harmed if this motion is granted. But they would suffer delay and disruption by the granting of this motion.

Your Honor indicated the last time that we were down here that you were totally aware of the need to conduct sensitive examinations in private. There is no better way to assure that leads dry up, that witnesses become devious, that witnesses disappear, than to conduct a public investigation.

And speed, Your Honor, is of the essence at this time for the committee, because our mandate runs out on the 28th of February, and we have to complete our hearing record under our current mandate by this date. We simply cannot afford

delay and disruption at this stage.

Finally, Your Honor, I think that the public interest hardly supports plaintiffs motion, and, of course, it must before Your Honor in his discretion can grant that motion.

The public interest will not be served if our investigations are delayed and disrupted. We think the public is entitled under our mandate to an orderly revelation of the so-called Hughes-Rebozo affair. That's we are trying to do, and we don't think it would be in the public interest if we are impeded in this task.

So to summarize, then, we feel that plaintiffs' two motions must be denied and defendants' motion for summary judgment granted and this case dismissed.

Your Honor, I think our committee still has important work to do, and I think this case should be dismissed now so that our committee and this Court should not have to trifle with the lawsuit that is so utterly devoid of merit.

Thank you.

1 MR. DAVIS: Your Honor, I'm afraid to speak colloquially, I'm not with it, because I don't understand my rights are those of giving a press conference and not a press conference.

I'm talking about my right to testify at an open hearing. I don't want to give press conferences.

And so far as being assured of secrecy by Senator Ervin, that doesn't solve my problem. We don't want secrecy.

In any event, I prefer to rely on the rulings of the Court rather than on the rulings of Senator Ervin, however qualified he may be.

If I was being told that the committee wanted to have private sessions after having interviewed us -- everybody wants to ignore the fact that we voluntarily gave them interviews in question and answer form, of which they have a transcript, they know exactly what we say we know. Now, they say they want us at an executive session.

Well, if that would be the end of it, I might weight the possibility rather than spending time here in Court.

That's not what they say. They want to have executive sessions, and leak out some kind of warped stories, and then they want to have a public hearing.

THE COURT: Now, you have made the assertion several times in your submissions and in your oral representations that there have been deliberate leaks, and the leaks,

2 you infer that the leaks have to do with the nature of the testimony that has been presented either by yourself or by some of the witnesses whom you represent.

Now, you alluded to what was reported in the newspaper about your presentation of certain sums of money to the committee. Now, what other specific leaks do you say have been made by the committee or some of its staff to the press that have to do with the substance of any of the testimony that either you or any of your witnesses whom you represent have given?

MR. DAVIS: Well, Your Honor, yes, innuendoes, leaks to the press about this money, for instance.

The suggestion is the money was given for a different purpose than it in fact was. And Senator Ervin is on the record as saying that he is unable to control the situation. And I say that if a witness ever has the right to be protected against these kinds of things -- I don't remember offhand -- that Mr. Justice Douglas who pointed out in one of these cases that I read from -- from being abused, terrorized, confused, or what have you, is in the protection of the public hearing.

That's what I'm talking about.

THE COURT: I fail to understand how you claim that any witness has been terrorized when each witness has been permitted --

MR. DAVIS: Well, Your Honor --

3 THE COURT: Don't interrupt me, Mr. Davis. I have listened to you, and I am going to listen to everything you have to say, but this is a Court that doesn't like to be interrupted in the midst of a statement.

I fail to understand how you say that you or your clients have been badgered or overridden in some sense in the presentation of your evidence, whatever it is that has been presented to the committee.

You have not been denied the right of counsel. There has been no suggestion that you have been compelled to testify. And I fail to understand at all how there is any basis for your contention that you have some constitutional right in a legislative investigation to override the determination of the Committee, the Legislative Committee, that the testimony during the course of the investigation must be presented in a public hearing.

I do not understand any constitutional basis for that contention. And the cases reflect no constitutional basis for that contention. And absent that, neither this Court nor any other Court, nor the legislature for that matter, can create a constitutional right.

Now, that this Court may agree with you and differ in some respect as to a manner of proceeding that may seem in your judgment or the Court's judgment, more fair, is not a situation to which this Court can address itself. If a validly

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constituted committee of the Congress has determined how it wishes to operate under a statutory mandate that it has, this Court has no authority to determine otherwise until such time as there has been an infringement of a statutory right.

And in the first instance, the Courts are clear that Congress is to determine its own rules. Congressional action is determined, the validity of congressional action is, in the first instance, determined by the Congress itself and not by the Courts.

Now, I will hear what you have to say.

MR. DAVIS: May I start, sir, with the last part. There is a statute that has been interpreted by this committee. Our contention is that it has been incorrectly determined. And when that state of affairs exists, I respectfully suggest that it is the duty of the Court to decide who is right. And I distinguish all of the cases which rely on the concept that the Congress or the committee acting pursuant to a statute has not yet made a determination.

Here we have had a determination made by this very committee. And, I submit, that, therefore, the situation is ripe on that part of the argument.

THE COURT: Am I not correct that at this juncture, the full committee has never acted with respect to this determination? Is that correct or is it not correct?

MR. DAVIS: Well, Your Honor, my problem with that

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is that sometimes they say a quorum consists of one person, and sometimes they say, my not being present, the committee has unanimously decided.

My record is bare in that regard, because, for instance, this so-called resolution that was adopted, described in the press was hastily convened, I don't know who was there or who wasn't there making the determination, whatever determination they made.

When I appeared and insisted to be heard by the committee, I was allowed to appear before a single Senator and I was told that under the rules that was the committee.

They have rules which are difficult to understand at times, because they do refer, as I say, to one Senator being a quorum. And I can only take these statements made on the record when I am told the committee has ruled.

On the record, I must proceed on the assumption that that's so.

THE COURT: And I think the Court has to proceed on the presumption that Congress has acted with regularity in conformance with its own rules. The Court cannot substitute itself for the judgment of the committee. The Court cannot exercise any function of monitoring the legislative activities of an investigatory committee, it cannot do so.

MR. DAVIS: In that connection, Your Honor, therefore, I say we must proceed on the assumption that the committee has

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acted properly in accordance with their rules and has made a determination, and that is exactly the point that I am addressing myself to in saying, and, therefore, the case is ripe for judicial review.

THE COURT: No. The ultimate determiner as to whether or not -- not the ultimate in the judicial sense, but the ultimate in the sphere of the legislature itself, is the full Senate.

MR. DAVIS: I'm sorry, Your Honor --

THE COURT: And any determination made by the Senate can only be overturned, upon proper application to the Court, to the extent that it's determined that a constitutional right has been violated with respect to the application of its own rules.

But, you see, you can't get to that point in the context of this litigation.

MR. DAVIS: I'm sorry, Your Honor, either I haven't followed or I have been confusing, because I'm not talking about the contempt procedures of the Senate. I'm talking about a piece of legislation that has been adopted by the Congress, and a determination made pursuant to the provisions of that statute.

THE COURT: And the record reflects, Mr. Davis, that as of this moment as this matter is before the Court, it is completely regular in terms of compliance with the statute. And

7 it is your contention to the contrary. But the record as it is reflected is unchallenged.

You draw different inferences by virtue of what you have stated to be your experience with respect to contacts with the committee and its staff. But the fact that you draw different inferences with respect to the regularity of the resolution, does not give this Court jurisdiction and authority to determine whether or not your inferences are correct.

MR. DAVIS: Your Honor, at this point I'm not sure whether I'm addressing myself to the power of the Court or whether it is a question whether the time has been reached when the Court should exercise its power.

I think, and I respectfully submit that the cases, certainly the cases which I have read which include the cases cited by Mr. Hamilton, all recognize the power of the Court.

To be sure, the only cases that have suggested otherwise have been that the Court may not interfere with the actual legislative process of a member of Congress.

But that is not what the issue here is. The issue is the Congress has empowered a committee to engage in certain activities. My first case I referred to, Your Honor, if you will recall, when they found that the Congress had not authorized the committee to engage in investigative hearings, it was enjoined.

Now, the question that I'm raising today is whether

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or not this committee is acting lawfully in accordance with the only authority they have to proceed in these investigations.

THE COURT: And the record reflects that it is, because the record --

MR. DAVIS: This is where we have a difference of opinion, whether it be on facts or on law. The question now is whether or not the interpretation of that statute which permits secret hearings is to be construed as one which merely permits this body controlled by this statute to proceed in the normal fashion of public hearings as mandated by the statute, and then permits portions of that testimony to be taken in executive sessions when it appears that there is a factual basis, to the committee, to be sure, for proceeding in that fashion.

The thing I am resisting, Your Honor, is the propriety of addressing ourselves to that question at this time. And I submit that now is the time, now is the only time when we can construe that statute even as permitting, when a formal resolution is adopted, to hold secret sessions, or is it going to be construed, as I contend it should be construed now, for the rights of the -- or to have an open hearing, and, to be sure, that if in those open hearings an area is opened up which permits the foreclosure or the temporary termination of those open hearings -- now, if we are going to assume that the statute is to be construed so as to permit any legislative committee, when it sees fit, whenever it sees fit, without any

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Judicial concept to guide it, or to interpret the statute -- then, to be sure, we have the determination by the Court.

But at that point I addressed myself as to whether or not that determination by the Court is an appropriate interpretation of the statute based upon its legislative history, et cetera, et cetera.

Up to this point I have been addressing myself, or attempting to address myself, to the question as to whether or not the facts here present make it ripe for us to address ourselves to that question. And the question now is: is what is the injury to the subcommittee carrying on its functions and the injury to the witnesses if they are deprived of an open hearing, on the assumption that they are entitled to an open hearing.

Now, to be sure, and I have not yet addressed myself to -- I am planning to -- on this motion, because I think our papers submitted to the Court reveal that the legislative history of that particular statute is clear, and that's to insure open hearings.

Now, most of the cases that have been submitted here where the Court has not interfered is when the party wanted a secret hearing, and the committee said, no, there are reasons for an open hearing. And at that point the Court would say, it may be that in the course of the open hearings something will happen which may entitle you to a secret hearing, but let's

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see what happens first.

That's the way I read the cases that I have read. I do not read those cases as saying that the Court is to sit on the assumption --

THE COURT: This Court cannot substitute its judgment for the judgment of the committee with respect to whether or not there is a possibility of testimonies falling in any of the three categories. That is a determination for that committee to make, and it has got to be made in the context of what the committee already knows and what the committee might have reason to suspect. It has got to be taken in that context, and the Court cannot substitute its judgment for that.

That's a legislative decision to be made. If the committee chooses to accept the representations of the staff, this Court cannot supervise or control that. And when the committee makes that determination, the Court is bound by it at this juncture.

This Court cannot presume at all, as you are free to do, Mr. Davis, but the Court is not free to do so, this Court cannot presume that a resolution of a duly constituted Senate committee was a pro forma resolution to comply with the congressional statute. I cannot make that assumption, and I refuse to do so.

MR. DAVIS: Your Honor, may I address myself to the last point made by the Court? I'm not seeking a presumption,

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Your Honor. I am merely asking you to look at the record of testimony heretofore given, look at the testimony of Mr. Gribben, and find in there, if you please, any one of those exceptions.

THE COURT: That's again, although it has been submitted to the Court, is not within the prerogative of the Court to determine whether or not that testimony in fact would fall within any of the three categories. That would presume for a moment that the Court knows as much as the staff and the committee already knows about this affair, and the Court is not a part of the investigation, and it would require all of the background of the investigation in order to make an informed judgment as to whether or not there is a likelihood or a possibility that testimony to be presented falls within any one of the three categories, or one or more of the three categories.

That is a determination to be made by the committee, not by a Court. And what view I may take of the evidence that has been presented by any one of the witnesses in terms of which, for example, you have submitted for the record in this case, is of no consequence, and it would be improper for the Court to express an opinion with respect to it.

MR. DAVIS: On that basis, Your Honor, and somewhat anticipating what Your Honor is indicating --

THE COURT: Well, you anticipate very accurately, Mr. Davis.

MR. DAVIS: I merely wish to point out that on that

12 theory the right to a public hearing, or an open hearing, by a witness, notwithstanding the congressional mandate, shall never prevail, shall never see the light of day from here into the hereafter. Why? Because, you might --

THE COURT: No, it will see the light of day as soon as I prove to be wrong.

MR. DAVIS: I was addressing myself to the ultimate Court.

THE COURT: It can always ultimately see the light of day.

Now, the only cases that are relevant to the procedure, your whole method of attack suggests to this Court that you have but one recourse, and if you are firm in your position that somehow you and your clients have this right to open public hearings in a legislative investigation, then you defy the subpoenas, either individually or collectively, and force the committee to make a record of its determinations, and have that record submitted to the full committee to determine whether it is going to ask for contempt proceedings, and then have that record submitted to the Attorney General of the United States to determine whether contempt proceedings should be brought to the Court.

Then we can proceed with that. But this Court knows of no time prior to that, under the law as it presently exists, that I have a right to tell Congress how to run its committees.

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MR. DAVIS: I was addressing the Court as if this were the ultimate Court.

THE COURT: Oh, no.

MR. DAVIS: I know that it is not. But for the purpose of initiating the procedure, I am addressing this Court. And what I'm saying, Your Honor, that if this Court is correct in the conclusion it is reaching, it then means that even though all of the factors to determine the right of a witness are here before us, we are not going to adjudicate those rights judicially, but we are going to say to that witness, now, if you think you have got a right, mind you, it is a function of the Court to determine what rights I have or don't have, but we are now going to say to those witnesses, you go before that subcommittee and you refuse to testify, which would be unlawful if you don't have the right you claim you have, but commit that illegal act, and if you happen to be wrong about what your rights are, whether they be constitutional or statutory, because then the Court will review whether in fact you are a criminal or not.

I submit to Your Honor that if someone doesn't take the bull by the horns and attempt to establish that I have a right, that I have a right to know my rights, that when a case is in a posture, as this one is, that I should be told whether I am right or whether the committee is right in construing the law, and not be told that my remedy is after I have been

14 indicted for violating the law.

THE COURT: We don't differ on the construction of the law. The law is very clear. You are in complete agreement with respect to that. You admit that Section 190a-1(b) says the conditions under which the Senate of the United States can conduct investigatory hearings in executive session. You wish this Court to review a factual determination that has been made by that committee. I say that I have no authority, and there ends it. Because I have no authority to do so, I cannot issue an injunction enjoining a senatorial committee or declare how the committee must perform its function.

I don't think we can accomplish anything further by prolonging this, you know. Your case has been well stated. You have filed your necessary papers in support of it. I will issue an order.

I am denying any preliminary injunction in this matter.

I do not understand, Mr. Hamilton, where the necessity arises for any refutation of any alleged misstatements of fact in the proposed statement of facts that has already been submitted with the motion for summary judgment. That escaped me during your argument. I haven't heard Mr. Davis contend any representations made in your statement of material facts which were to be controverted in some fashion. But if that has escaped me, I will give you an opportunity to make

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that record absolutely clear. If you wish to review your statements and balance them out, do think the matter is ripe for summary judgment. But I will give you the opportunity, whatever you think is reasonable. I will only determine initially the motion for a preliminary injunction, and I will hold in abeyance your motion for summary judgment and dismissal to make sure that you have an opportunity, Mr. Davis, to respond to the Government's motion to dismiss. And the Government--

MR. DAVIS: Your Honor, may I at this point suggest as to whether or not Mr. Hamilton is in a position to grant me enough time to approach the Court of Appeals on this question.

As things now stand, I agree--

THE COURT: You will have the time required by statute. I'll decide of the matters before four o'clock this afternoon, or even sooner.

Do you want to submit a proposed order?

MR. DAVIS: I understand that tomorrow morning-- I agreed to make available another witness tomorrow morning unless I was still actively engaged in the Court proceedings, and that was the understanding we have on the record which is not before me.

The only thing I am inquiring as to whether or not either at the suggestion of the Court or by the order to be entered by the Court, I am asking that I be given the minimum amount of time which would give me an opportunity to present the

matter to the Court of Appeals, because, obviously, this is my only chance to obtain a review of the determination that this Court is making.

THE COURT: Mr. Hamilton, do you wish to respond?

MR. HAMILTON: Your Honor, if Mr. Davis wants to go to the Court of Appeals this afternoon, I'm quite happy to go.

I am not at liberty to say that we will postpone any private sessions that are now scheduled. I am afraid that decision would have to be made by the Committee.

I might say just a word on my comment before I started.

THE COURT: I can expedite it by signing the order, and then you can make application for the appropriate stay at the appellate court.

MR. HAMILTON: I think Your Honor would like for me to comment just briefly on my earlier statement that there were factual statements in the plaintiffs' statement of facts that I disputed.

I think none of those factual statements are relevant from the standpoint of my motion. But there are statements in there that imply that the committee or the staff has been on purpose leaking information to defame the plaintiffs, and I simply did not want those statements to stand on the record, because, as I said before, I think they are false.

There are also some other statements in there about

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what the committee has or has not done and what information the committee has available to it that I understand from the people who are more intimately involved in this investigation than I, are false, and I didn't want the record to stand on those, either.

But I think from the standpoint, certainly, of disposing of my motion to dismiss, for summary judgment, they are not applicable and I am not sure they really are in terms of Mr. Davis' motion. But since there are rather pointed statements in there about our improprieties, which I disagree with, I didn't want them to stand without some refutation.

THE COURT: I don't think they are material to the matters that are involved in deciding a summary judgment motion.

MR. HAMILTON: I think they are not, either, Your Honor.

THE COURT: Statements of material fact about which there is dispute, I don't think these would fall in that category. But if for any reason there is any indication there is a material fact about which there is dispute, then that can be directed to the Court's attention. Otherwise, I think we are in a position to dispose of the entire case.

MR. HAMILTON: I would agree with that, Your Honor.

THE COURT: All right. I will take a short recess and resume with the other matters.

(Whereupon, at 11:15 a.m. the hearing was concluded.)

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REPORTER'S CERTIFICATE

This record is certified by the undersigned official reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.



Doyne W. Spencer
Doyne W. Spencer

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER

v.

CIVIL ACTION NO. 2107-73

SENATE SELECT COMMITTEE
ON PRESIDENTIAL CAMPAIGN
ACTIVITIES

FILED.

DEC 10 1973

O R D E R

JAMES F. DAVEY, Clerk

Upon consideration of Plaintiffs' Motion for Preliminary Injunction, the Opposition thereto, and argument of counsel and the entire record herein, it appearing to the Court that Plaintiffs likelihood of success on the merits is doubtful at best in that 1) the Resolution of the Senate Select Committee of November 29, 1973, is on its face regular and in compliance with the requirements of 2 U.S.C. §190a - 1(b) and 2) even if Plaintiffs are correct and the statutory provisions have been violated the Court has no authority at this stage of the proceedings to interfere with ongoing proceedings of the Congress, Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972), Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971), and it further appearing that Plaintiffs have failed to show irreparable injury and that the balance of public interest in the regulation of powers held in the proceedings of this Select Committee outweighs the present interests of Plaintiffs therein, now therefore

it is this 10th day of December, 1973,

Ordered, that Plaintiffs Motion for Preliminary Injunction be and hereby is DENIED.

Aubrey W. Robinson, Jr.
Judge

Date: DECEMBER 10, 1973

UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

FILED	DEC 12 1973
JAMES F. DAWRY CLERK	

RICHARD DANNER, et al.,)
Plaintiffs,)
-against-) CIV. NO. 2107-73
THE SENATE SELECT COMMITTEE ON)
PRESIDENTIAL CAMPAIGN ACTIVITIES,)
et al.,)
Defendants.)

NOTICE OF APPEAL

Notice is hereby given that plaintiffs in the above-captioned matter appeal to the United States Court of Appeals for the District of Columbia Circuit from an order entered by the District Court of the District of Columbia on December 10, 1973, denying plaintiffs' request for a preliminary injunction.

DAVIS & COX

By:

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James Hanrahan
G-308

United States Court of Appeals
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2220

September Term, 19 73
 Civil Action 2107-73

Richard Danner, et al.,
 Appellants

United States Court of Appeals
 for the District of Columbia Circuit

v.

The Senate Select Committee on
 Presidential Campaign Activities,
 et al.

HUGH E. KLINE
 Clerk

Before: Wright, Robinson and MacKinnon, Circuit Judges

O R D E R

The above case is before the Court for consideration
 of appellants' motion for stay and for expedited consideration
 of the issues raised in plaintiffs' motion for a preliminary
 injunction. Appellees have filed a memorandum in opposition
 thereto.

On consideration of the foregoing, it is

ORDERED by the Court that appellants' aforesaid motion
 is denied.

Per Curiam

For the Court:

HUGH E. KLINE, Clerk

By: *Daniel M. Cathey*
 Daniel M. Cathey
 Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD DANNER, :
et al. :
v. : CIVIL ACTION NO. 2107-73
SENATE SELECT COMMITTEE :
ON PRESIDENTIAL CAMPAIGN :
ACTIVITIES :
----- : 4111

ORDER

Upon consideration of Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Summary Judgment, the respective oppositions thereto, and the entire record herein, it appearing to the Court that 2 U.S.C. §190(a) - 1(b) and (2) provides no basis for direct judicial review of Congressional action, and it further appearing that in the present context this Court has no authority to interfere with ongoing proceedings of the Congress, Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972), Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971), now therefore it is this 4th day of January, 1974,

ORDERED that this action be and hereby is dismissed for failure to state a claim upon which relief can be granted.


Aubrey E. Robinson, Jr.
Judge

**V. IMMUNITY APPLICATIONS BY THE SENATE SELECT
COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES**

<u>Persons for Whom the Immunity Orders Were Sought</u>	<u>Dates on Which the U. S. District Court for the District of Columbia Granted the Immunity Applications</u>
1. Bernard Barker	May 11, 1973
2. Frank Sturgis	May 11, 1973
3. Eugenio Martinez	May 11, 1973
4. Virgilio Gonzales	May 11, 1973
5. G. Gordon Liddy	May 16, 1973
6. Roy E. Sheppard	May 29, 1973
7. Jeb Stuart Magruder	June 12, 1973
8. John Wesley Dean III	June 12, 1973
9. David Young	July 5, 1973
10. Gordon Strachan	July 6, 1973
11. Martin Douglas Kelly	October 1, 1973
12. Robert Melton Benz	October 1, 1973
13. Donald Segretti	October 1, 1973
14. John J. Ragan	October 5, 1973
15. John R. Buckley	October 9, 1973
16. Robert E. Bartolme	October 29, 1973
17. Matthew E. Clarke, Jr.	Octover 29, 1973

IMMUNITY APPLICATIONS (Continued)

<u>Persons for Whom the Immunity Orders Were Sought</u>	<u>Dates on Which the U. S. District Court for the District of Columbia Granted the Immunity Applications</u>
18. Ian Cusheenan	October 29, 1973
19. Robert Bibble	October 29, 1973
20. Daniel A. Kissel	October 29, 1973
21. Stanley J. Lapkowski	October 29, 1973
22. Gordon Stafford	October 29, 1973
23. Roy E. Walker, Jr.	October 29, 1973
24. Sol M. Edidin	November 12, 1973
25. Bob A. Lilly	November 13, 1973
26. Robert O. Isham	November 13, 1973
27. Barton D. Eaton	December 4, 1973
28. John H. Meier*	December 6, 1973

*Although the Court granted the Select Committee authority to confer immunity on Mr. Meier, immunity was never conferred by the Select Committee because Mr. Meier was not cooperative.

**VI. PETITIONS BY THE SENATE SELECT COMMITTEE
ON PRESIDENTIAL CAMPAIGN ACTIVITIES FOR
WRITS OF HABEAS CORPUS AD TESTIFICANDUM**

<u>Persons for Whom Writs of Habeas Corpus Ad Testificandum Were Sought</u>	<u>Dates on Which the Writs Were Issued by the U. S. District Court for the District of Columbia</u>
1. Eugenio Martinez	May 11, 1973
2. Bernard Barker	May 11, 1973
3. E. Howard Hunt	May 14, 1973
4. Virgilio Gonzales	May 14, 1973
5. Frank Sturgis	May 14, 1973
6. E. Howard Hunt	May 16, 1973
7. Bernard Barker	May 23, 1973
8. G. Gordon Liddy	May 31, 1973
9. E. Howard Hunt	June 7, 1973
10. E. Howard Hunt	July 20, 1973
11. Frank Sturgis	July 24, 1973
12. E. Howard Hunt	September 24, 1973
13. Bernard Barker	September 18, 1973

**PETITIONS FOR WRITS OF HABEAS CORPUS
AD TESTIFICANDUM (Continued)**

**Persons for Whom Writs
of Habeas Corpus Ad
Testificandum Were Sought**

**Dates on Which the Writs Were
Issued by the U. S. District Court
for the District of Columbia**

14. Bernard Barker Frank Sturgis Virgilio Gonzales Eugenio Martinez	September 27, 1973
15. Virgilio Gonzales	November 8, 1973
16. Frank Sturgis	November 8, 1973
17. Bernard Barker	November 8, 1973
18. Eugenio Martinez	November 8, 1973
19. Virgilio Gonzales	December 5, 1973
20. Eugenio Martinez	December 5, 1973

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